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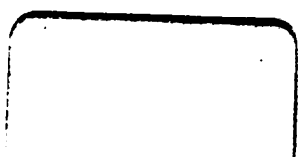
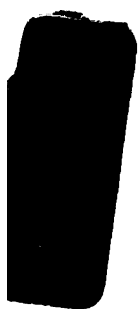
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REPORTS
OF
CASES ARGUED AND ADJUDGED
IN
THE SUPREME COURT
OF
THE UNITED STATES,
JANUARY TERM, 1850.

By BENJAMIN C. HOWARD,
COUNSELLOR AT LAW, AND REPORTER OF THE DECISIONS OF THE SUPREME COURT OF THE
UNITED STATES.

VOL. IX.

SECOND EDITION.

EDITED, WITH NOTES AND REFERENCES TO LATER DECISIONS,

BY
STEWART RAPALJE,
AUTHOR OF THE "FEDERAL REFERENCE DIGEST," ETC.

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SUPREME COURT OF THE UNITED STATES.

HON. ROGER B. TANEY, Chief Justice.

HON. JOHN McLEAN, Associate Justice.

HON. JAMES M. WAYNE, Associate Justice.

HON. JOHN CATRON, Associate Justice.

HON. JOHN McKINLEY, Associate Justice.

HON. PETER V. DANIEL, Associate Justice.

HON. SAMUEL NELSON, Associate Justice.

HON. LEVI WOODBURY, Associate Justice.

HON. ROBERT C. GRIER, Associate Justice.

REVERDY JOHNSON, Esq., Attorney-General.

WILLIAM THOMAS CARROLL, Esq., Clerk.

BENJAMIN C. HOWARD, Esq., Reporter.

ORDER OF COURT.

May 29, 1850.

It is ordered, that the Reporter and Clerk of this Court shall digest a plan for making up the records in the courts below which are to be brought to this Court by writs of error or by appeal. That the same shall be submitted to the Chief Justice for his approval, and if approved by him, that the Clerk be directed by the Chief Justice to have the same printed; copies of which the Clerk shall send to the Judges of the Circuit and District Courts of the United States, and to the Clerks of the same.

PROCEEDINGS OF COURT
HAD UPON THE
DEATH OF MR. CALHOUN.

MONDAY, April 1, 1850.

UPON the opening of the Court the Chief Justice said, that the Court had learned with much sorrow that Mr. Calhoun died yesterday morning, and from his long public services, and the high offices he had filled under the government, the Court deemed it proper, as a mark of respect for his memory, to adjourn to-day without the transaction of any business. The Court therefore adjourned until 12 o'clock to-morrow.

LIST OF ATTORNEYS AND COUNSELLORS

ADMITTED AT THE ADJOURNED DECEMBER TERM, 1849.

| | |
|---|-----------------------|
| James B. Robb | Massachusetts. |
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| William Whiting | Massachusetts. |
| John H. Martindale | New York. |
| J. H. Markland | Pennsylvania. |
| John D. Sherwood | New York. |
| Lucius Pitkin | New York. |
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| Archibald W. Hamilton | Kentucky. |
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| Humphrey Marshall | Kentucky. |
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| S. A. Douglas | Illinois. |
| George R. Andrews | New York. |

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THE DECISIONS
OF THE
SUPREME COURT OF THE UNITED STATES,
AT
JANUARY TERM, 1850.

MICHAELA LEONARDA ALMONESTER, THE WIFE SEPARATED
FROM BED AND BOARD OF JOSEPH XAVIER DELFAU DE
PONTALBA, PLAINTIFF IN ERROR, *v.* JOSEPH KENTON.

State courts have a right to decide upon the true running of lines of tracts of land, and this court has no authority to review those decisions under the twenty-fifth section of the Judiciary Act.¹

Where the decision was that the true lines of the litigants did not conflict with each other, but the losing party alleged that her adversary's title was void under the correct interpretation of an act of Congress, this circumstance did not bring the case within the jurisdiction of this court.²

Nor is the jurisdiction aided because the State court issued a perpetual injunction upon the losing party. This was a mere incident to the decree, and arose from the mode of practice in Louisiana, where titles are often quieted in that way.

THIS case was brought up, by writ of error, from the Supreme Court of the State of Louisiana for the Eastern District. It was brought up upon the ground that there was drawn in question the validity of a statute and an authority exercised under the United States, and the decision was against the validity of the said statute or authority; also, that there was drawn in question the construction of a clause of a treaty and of a statute of the United States, and the decision was against the title, right, and privilege specially claimed and set up under such clauses of said treaty and statute.

As the suit was more analogous to an ejectment than to any

¹ *S. P. McDonough v. Millandon*, 3 How., 693; *Mackay v. Dillon*, 4 Id., 420; *Farmer's Heirs v. City of Mobile*, Id., 451; *Moreland v. Page*, 20 Id., 522. See also *Kennedy v. Hunt*, 7 How., 593.

² "The fact that the land to which the boundary relates is held by a title derived from an act of Congress does

not change the result. If the title be admitted as recognized by the act, its location upon the land is a subject wholly within the cognizance of the State tribunals, and it is not within the power of this court to revise their action. In such cases our authority is limited to errors relating to the title." *Lanfear v. State*, 4 Wall., 209.

other remedy known to the common law, it will be best explained by showing the title set up by the respective parties. The first step in the proceedings was the filing of the following petition, on December 28, 1831.

“To the Honorable the District Court of the First District of the State of Louisiana: The Petition of Joseph Kenton, residing in the City of New Orleans, respectfully shows :

“That your petitioner is the lawful and only proprietor and
*2] *owner of a tract of land situated in the rear of the city of New Orleans, between the inhabited part of the city and the Bayou St. Jean ; said tract having two arpents front on the southwesterly side of the Canal Carondelet, near the first half-moon, and extending in depth between parallel lines to Common Street, on which also it fronts ; the one side line being seventeen arpents ten toises and two feet, and the other seventeen arpents and five toises in length ; all of which appears more particularly by a plan of said tract of land drawn by Charles F. Zimpel, late a sworn surveyor, dated the 11th day of February, (1835,) and deposited in the office of Theodore Seghers, Esq., notary public of this city, on which plot your petitioner's tract of land is designated as No. 3, and is marked on the general plan of the city of New Orleans, executed and published by the said Charles F. Zimpel, ‘Wdw. Fleitas.’

“Your petitioner acquired said tract of land of Jean Manuel Fleitas, Barthelemy Fleitas, and Virginie Fleitas, wife of Louis Aime Pigneguy, by act passed before the said Theodore Seghers, notary public, on the 19th day of May (1835).

“Your petitioner alleges, that from that period until the present time he has had the quiet possession of said tract of land, and that those from whom he derived title have had the peaceable and uninterrupted possession of the same, under perfect titles, for upwards of thirty-five years.

“Your petitioner further shows, that notwithstanding the premises, Mrs. Michaela Leonarda Almonester, the wife of Joseph Xavier Celestin Delfau, Baron of Pontalba, separated from bed and board from the said husband, by a judgment of the tribunal of the first instance, at Senlis, in France, bearing date the 25th day of February, (1836,) has, by her agent, Noel Barthelemy Le Breton, residing in this city, offered for sale at public auction, to be sold on the 28th day of this present month, through Messrs. Mossy & Garidel, auctioneers, a certain tract of land divided into a great number of lots, fronting on the Bayou road and extending across the Canal

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Carondelet, over the property of your petitioner, to Common Street.

"Your petitioner further shows, that the said Noel Barthelemy Le Breton has been constituted the general and special agent at New Orleans of the said Mrs. Pontalba, by powers of attorney executed before Berceau and his colleague, notaries at Paris, in France, where she resides. That your petitioner has amicably requested the said agent to desist from this intended sale as far as it affects the above-described property of your petitioner, and would disturb him in the peaceable possession thereof, but he refuses to yield to said request.

"Your petitioner therefore prays that a writ of injunction may issue, enjoining the said Mrs. Pontalba [*3 and Noel Barthelemy Le Breton, her agent, as well as Messrs. Mossy & Garidel, the above-mentioned auctioneers, from proceeding to sell, until the further order of the court, such of the above-mentioned lots of ground as are situated on the above-described tract of land belonging to your petitioner.

"Your petitioner further alleges, that the said Mrs. Pontalba and her agent pretend title to the aforesaid property of your petitioner, and hold out to the public that your petitioner has no title to the same, and by their deeds and words aforesaid have caused him damage to the amount of five thousand dollars, which he is entitled to recover, and to have them enjoined from ever pretending title to said property.

"Wherefore your petitioner respectfully prays that the said Mrs. Pontalba, by her agent Noel Barthelemy Le Breton, may be cited to appear and answer this petition, and to set forth by what title she claims the property above described of your petitioner; and that, after all due and legal proceedings, judgment may be rendered in favor of your petitioner against the said Mrs. Pontalba; that the sale by her of any part of the above-described tract of land belonging to your petitioner be perpetually enjoined; and that she may be moreover perpetually enjoined from pretending title to said property; that she be condemned to pay to your petitioner five thousand dollars damages, with all costs of suit; and that your Honor would afford all such other and further relief as the nature of his case may require, and as to justice and equity may belong. As in duty bound, &c.

(Signed,) ISAAC T. PRESTON, *Att'y for Petitioner.*"

To this petition the defendant filed the following answer.

"The Answer of Michaela Leonarda Almonester, the Wife separated from bed and board of Joseph Xavier Celestin

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Delfau Pontalba, herein represented by Noel Barthelemy Le Breton, her attorney in fact, to the Petition filed in this Court at the suit of Joseph Kenton, of New Orleans:

"This respondent comes now into court by her counsel, and for answer says, that she denies all and singular the facts and allegations in the said petition set forth. And this respondent further answering says, that the plaintiff could derive no title whatsoever to the property by him claimed from the transfer unto him executed by Jean Manuel Fleitas, Barthelemy Fleitas, and Virginie Fleitas, per act before T. Seghers, notary, of the 19th of May, 1835.

*4] * "This respondent denies that the plaintiff's vendors had at any time any good title to the property by them sold, or were ever in possession thereof.

"This respondent, on the contrary, contends that she is the sole and lawful proprietor of the land claimed by the plaintiff, and that she has had title to, as well as possession of, the same for fifty-five years and upwards.

"That this respondent further says, that the injunction sued for and obtained by said Kenton against the sale of said property was unjust, illegal, and malicious, and has inflicted injury to the interests of this respondent to an amount exceeding twenty-five thousand dollars; wherefore this respondent prays that said injunction be dissolved, at the costs of the plaintiff; that she be permitted to reconvene against him, and have judgment for the said sum of twenty-five thousand dollars, and to that effect that the said Kenton be cited to appear and answer this petition in reconvention, and be condemned as prayed for.

"And this respondent prays for all other and further relief which the nature or equity of the case may require.

"And this respondent will ever pray, &c.

(Signed,)

SOULE,

C. DERBIGNY, *Of Counsel.*"

Much documentary evidence was filed, and oral testimony taken in open court, all of which was inserted in the record.

When the cause came on for trial, in February, 1838, the plaintiff, Kenton, produced a Spanish grant, dated 20th of May, 1801, issued to Carlos Guardiola, by Don Ramon de Lopez y Angulo, the Intendant of Louisiana, and a regular chain of conveyances from the original grantee down to himself. This grant covered the land in dispute.

The defendant claimed title under the following documents:

1st. A concession to Louis Cezaire Le Breton, in 1752.

2d. A concession to Alexandre Latil, in 1764.

Upon the trial, the District Court decided that neither of these concessions included the land in controversy.

The defendant then relied upon a plea of prescription which had been previously filed, being a plea of prescription of ten, twenty, and thirty years. But the court overruled the plea for each of these periods of time.

The case was carried by appeal to the Supreme Court of the State of Louisiana, where the argument involved the following points, viz :—

1. That the grant to Guardiola was void, because, after the 1st of October, 1800, the date of the treaty of San Ildefonso, *Spain was no longer the sovereign of Louisiana, and because the 14th section of the act of Congress passed on the 26th March, 1804, declared all such grants to be null and void. But the court overruled these objections to the grant, and also decided that the District Court was right in saying that the two concessions set up by the defendant did not cover the land in dispute, and in saying also that the plea of prescription was not well founded. The Supreme Court therefore affirmed the judgment of the District Court; which was, that the injunction served upon the defendant should be made perpetual. [*5]

A rehearing was afterwards granted, on the single question whether Guardiola's grant was protected by the proviso to the 14th section of the act of Congress of the 26th March, 1804. That section declares, "that all grants for lands within the territories ceded by the French Republic to the United States by the treaty of the 30th of April, 1803, the titles whereof were, at the date of the treaty of San Ildefonso, in the crown, government, or nation of Spain, and every act and proceeding subsequent thereto, of whatsoever nature, towards the obtaining of any grant, title, or claim to such lands, and under whatsoever authority transacted or pretended, be, and the same are hereby declared to be, and to have been from the beginning, null and void, and of no effect in law or equity; provided, nevertheless, that any thing in this section contained shall not be construed to make null and void any *bond fide* grant, made agreeable to the laws, usages, and customs of the Spanish government, to an actual settler on the lands so granted for himself, and his wife and family; or to make null and void any *bond fide* act or proceeding done by an actual settler, agreeably to the laws, usages, and customs of the Spanish government, to obtain a grant for lands actually settled on by the person or persons claiming title thereto,

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if such settlement in either case was actually made prior to the 20th day of December, 1803," &c.

After the rehearing, the court decided that the grant to Guardiola was embraced in the proviso which protects actual settlers before the cession to the United States, and was also protected by the treaty of cession itself.

From this judgment, a writ of error brought the case up to this court.

It was argued by *Mr. Brown*, on the part of Kenton, the defendant in error, no counsel appearing for the plaintiff in error. This argument was an elaborate examination of the act of Congress, and the other grounds upon which the Supreme *Court of Louisiana rested its judgment; but *6] as the decision of this court was confined to a single view of the case, it is not deemed necessary to insert Mr. Brown's argument.

Mr. Justice CATRON delivered the opinion of the court.

This case is brought before us by writ of error to the Supreme Court of Louisiana. The suit originated in a petition filed the 28th of December, 1836, by Kenton, in the First District Court of that State, alleging that the defendant, Pontalba, through her agent, Le Breton, had advertised for sale certain lots of ground in the rear of the city of New Orleans, claiming to own the same, which land the petitioner averred belonged to him, and was, at the time of filing the bill, in his possession, and that it had been in the peaceable and uninterrupted possession of himself and those under whom he derived title for upwards of thirty-five years. The petitioner therefore prayed that the defendant might be restrained from selling or intermeddling with the property in question, and that he might be quieted in his title. In answer, the defendant averred that she was the legal owner of the premises, and had been in possession of the same for more than fifty-five years. On the trial of the cause in the District Court, the plaintiff introduced, with other testimony,—

1. A concession made by Don Ramon de Lopez y Angulo, with the certificates of survey, records, &c., dated May 20, 1801, granting the premises in question to Carlos Guardiola.

2. An act of sale from Guardiola to Fleitas, conveying the property to the latter, dated June 5, 1805.

3. A sale of the land from the heirs of Fleitas to the plaintiff, dated May 19, 1835.

4. He also produced testimony to show that he and those

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under whom he claimed had been in possession since the date of the grant to Guardiola in 1801.

The defendant then introduced in evidence an act of sale from L. C. Le Breton to Madame Dauberville for six arpents and fourteen toises front, dated May 30, 1757, reciting that the vender was the owner of the premises sold, as well as of two arpents front adjoining the same, which he reserved from such sale. She also presented acts of sale made in 1757 and 1758, from Le Breton and from the succession of Dauberville, conveying the whole of the above-mentioned lands to Latil, and a grant made to the latter, by the Spanish government in 1764. She then exhibited a full chain of title from Latil to herself, and proved possession of the premises covered by her title papers from 1789.

*A decree was made by the District Court in favor of the petitioner, Kenton, and a perpetual injunction [17] awarded in accordance with his prayer. The cause was carried to the Supreme Court on appeal, where the decree of the inferior court was affirmed. Both courts decided that the premises included in the Spanish grant of 1801, to Guardiola, were not the same as those covered by the acts of sale and grant to Latil.

Now that this court has no jurisdiction, under the 25th section of the Judiciary Act of 1789, to reëxamine the decision of a State court, which drew in question the mere fact of where a dividing line between two tracts of land was, is too plain for discussion. Had the decision of the Supreme Court of Louisiana stopped here, then certainly jurisdiction would be wanting. But that court went further in its first opinion, and then a rehearing was demanded, after the first decree in favor of Kenton had been pronounced; and a rehearing was granted on the single question whether Guardiola's grant was protected by the proviso to the 14th section of the act of Congress of March 26, 1804.

That section declares, "that all grants for lands within the territories ceded by the French Republic to the United States by the treaty of the 30th of April, 1803, the titles whereof were, at the date of the treaty of San Ildefonso, in the crown, government, or nation of Spain, and every act and proceeding subsequent thereto, of whatsoever nature, towards the obtaining of any grant, title, or claim to such lands, and under whatsoever authority transacted or pretended, be, and the same are hereby declared to be, and to have been from the beginning, null and void, and of no effect in law or equity; provided, nevertheless, that any thing in this section contained shall not be construed to make null and void any *bond*

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fide grant, made agreeably to the laws, usages, and customs of the Spanish government, to an actual settler on the lands so granted for himself, and his wife and family; or to make null and void any *bona fide* act or proceeding done by an actual settler, agreeably to the laws, usages, and customs of the Spanish government, to obtain a grant for lands actually settled on by the person or persons claiming title thereto, if such settlement, in either case, was actually made prior to the 20th day of December, 1803," &c.

And on this proviso of the statute, an opinion was expressed by the court below, which is found in the record, and was as follows:—

"The proviso above recited contemplates two classes of titles: first, those granted according to the ordinances and usages of the Spanish government, upon the usual condition *8] of settlement upon the lands so granted to heads of families, provided such condition was complied with before the cession to the United States; and second, such as were applied for after the settlement was made, commonly called permission to settle with a *requête*. In both cases we are to look, in our opinion, to the laws and usages of the Spanish government for the definition of an actual settler, rather than to subsequent acts of Congress, which provide for preëmptions in favor of such persons as shall have settled upon, inhabited, and cultivated a part of the public domain. This proviso recognizes the authority of Spain to make certain grants after the date of the treaty of San Ildefonso, and therefore it cannot be said that Congress had treated this as exclusively a political question, and absolutely decided that the sovereignty was changed at that period. The only doubt is, whether Guardiola can be classed in either of the categories expressed in the act of Congress. He exhibits a title in form to a small tract of land, which was appurtenant to another tract already owned and possessed by him. The Intendant of the province, in the preamble of his patent, states him to be a resident of the city, and owner of a piece of land on the Bayou road, where he has his dwelling; which property is deficient in depth to graze his cattle upon. It is for these reasons that a small additional grant is made to him. This was done in conformity with the existing ordinances relative to the distribution of the public domain; Guardiola was certainly regarded by the Intendant as actually settled on the land to which his new grant was but an appendage; and although the expression used in the opinion of the court first pronounced, that the grant was inhabited and improved, was perhaps not strictly accurate, especially with reference to

subsequent acts of Congress defining rights of preëmptions, yet substantially we consider the grant to Guardiola as embraced in the proviso which protects actual settlers before the cession to the United States; and we cannot suppose Congress intended by the act in question, or by any subsequent legislation, to declare null and void those small grants made *bonâ fide* according to the usages of the Spanish government to inhabitants of the province, to meet the wants of a growing population.

"Looking upon Guardiola's grant as one made in good faith, according to the usages and ordinances of the Spanish government, and as having become private property according to those laws and usages, and according to the treaties between France and Spain, and the law of nations, we consider it protected, not merely by the proviso of the act of Congress first recited, but by the treaty of cession.

*"It is therefore ordered, adjudged, and decreed, that the judgment first pronounced remain undisturbed." [*9]

By section 909 of the Code of Practice governing the Supreme Court of Louisiana, that court is required to state the reasons for its judgments, by citing as exactly as possible the laws on which it founds its opinions; and by section 912, a party dissatisfied with the judgment may apply for a rehearing in the cause, by petition. From the petition and opinion, it does appear that a construction of the 14th section of the act of 1804 was drawn in question by the State Court; but it does not therefore follow that this court has jurisdiction; the fact is found, that no interference exists between the tracts of land respectively claimed, and with this settled fact we have to deal. It concluded the right against Pontalba; she could not go beyond the boundary established as the true one by that decision. And the next inquiry is, whether she can be heard in this court, to call in question a construction of the act of 1804, which did not touch her paper title, nor affect her right in any degree. The State court held that Kenton's title was valid, and sanctioned by the proviso to the 14th section of the act; the decision, therefore, so far as he was concerned, was not opposed, but in conformity, to the right claimed under the statute; and the defendant below, Pontalba, having no opposing title to the land in dispute, could not be injured by the opinion expressed on Kenton's title. The only plausible ground on which jurisdiction could be claimed arises from the mode of proceeding in the State courts. The action was brought by Kenton for slander of title, and to prevent a public sale of land then in his actual

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possession, and which had been so for thirty-five years next previous. The defendant, Pontalba, denied that Kenton had any title, and set up title in herself to the land claimed by Kenton in his petition; and by her answer and petition, in reconvention asked an affirmative decree in her favor for damages; thus becoming a plaintiff likewise. This is an ordinary mode of trying title in Louisiana. Issue being joined on the right, and this adjudged to be in Kenton, the court gave a decree in his favor, and awarded a perpetual injunction against Pontalba, restraining her from selling the land. The injunction was a mere incident to a final adjudication establishing a right to real property; the decree carried with it (as against the opposing party) conclusive force, to which nothing could be added by the award of an injunction; it was intended to prevent any further illegal intermeddling by the other party, and was rather in execution of the decree than *10] a substantial part of it. The awarding such writ *cannot, therefore, be relied on as a circumstance giving this court jurisdiction; and being of opinion that on no ground presented by the record can this cause be entertained, we accordingly order that it be dismissed.

ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Louisiana for the Eastern District, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that this cause be, and the same is hereby, dismissed for the want of jurisdiction.

WILLIAM H. IRWIN, APPELLANT, v. GEORGE O. DIXON
AND JOHN A. DIXON.

Where a right to a public highway is alleged to be violated, and a remedy is sought through an injunction, it is not issued, either at the instance of a public officer or private individual, unless there is danger of great, continued, and irreparable injury; and not issued at the instance of an individual, claiming under such public right, unless he has suffered some private, direct, and material damage beyond the public at large.¹

¹ FOLLOWED. *Clark v. Donaldson*, 104 Ill., 640. CITED. *St. Louis v. Knapp, Stout, &c Co.*, 6 Fed. Rep., 223; s. c., 2 McCrary, 518. See *Root v. Commonwealth*, 98 Pa. St., 175.

An injunction to prevent a public nuisance may be obtained by an individual, when such nuisance will be an extraordinary injury, when created, irreparable in damages or irremediable.

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Where the remedy by injunction is sought for an injury to an individual, and not public right, it is necessary also that the right to raise the obstruction should not be in controversy, or have been settled at law. Otherwise, an injunction is not the appropriate remedy. Until the rights of the parties are settled by a trial at law, a temporary injunction only is issued to prevent an irremediable injury.²

The principles examined which constitute a dedication of land to public uses.

THIS was an appeal from the Circuit Court of the United States for the District of Columbia and County of Alexandria. It was a bill filed by the Dixons to restrain the appellant from erecting an inclosure in what they claimed to be a public highway, in the town of Alexandria, by which the said highway was obstructed, and the ancient lights of the appellees,

ble at law, without a multitude of suits. *Parish v. Stephens*, 1 Oreg., 78. So an individual who has suffered special damage by the obstruction of a navigable river, may enjoin the nuisance. *Jolly v. Terre Haute Drawbridge Co.*, 6 McLean, 237; *United States v. Railroad Bridge Co.*, Id., 517; *United States v. New Bedford Bridge*, 1 Woodb. & M., 402; *Pennsylvania v. Wheeling Bridge*, 13 How., 519; *Works v. Junction Railroad*, 5 McLean, 425.

But one who has suffered an injury, no different in character from that sustained by the public in general, will not be entitled to file a bill, for an obstruction of a highway. *Chicago v. Union Building Assoc.*, 102 Ill., 379; s. c., 40 Am. Rep., 598; *Adams v. Popham*, 76 N. Y., 410, 413.

An injunction against the maintenance of a structure claimed to be a common nuisance will not be granted, unless plaintiff's actual or threatened injury is other or greater than that sustained by the rest of the community in the neighborhood; nor will it be granted even when that is shown, unless the injury, actual or threatened, be of a serious or irreparable character, and plaintiff has used diligence in applying. *Ninth Av. R. R. Co. v. New York Elevated R. R. Co.*, 7 Daly (N. Y.), 174.

A mere change in the line of a public road is not such an obstruction as will be enjoined at the suit of one who, with the general public, is inconvenienced in common, where in making the application a three years' delay is unaccounted for. *Richeson v. Richeson*, 8 Bradw. (Ill.), 204.

Where the owner of a lot fronting

upon a street in a city erects a stoop and fence in front thereof, so as to reduce the space left for public travel upon the sidewalk from nineteen to eight feet, an owner of a lot fronting on the same street, and distant about one hundred feet from the obstruction so created, may maintain an action to have the same abated as a nuisance. *Crooke v. Anderson*, 23 Hun (N. Y.), 266.

At the suit of a land-owner, equity will enjoin a threatened obstruction of a highway, where the very value and substance of plaintiff's estate would suffer thereby serious special injury. *Keystone Bridge Co. v. Summers*, 13 W. Va., 476.

In Wisconsin, it is settled law, "that an obstruction which prevents a lawful use of a public highway, besides being a public nuisance, is a special injury to adjoining lot-owners, against which they may have an injunction, when threatened. *Pettibone v. Hamilton*, 40 Wis., 402. In all such cases, however, the injunction will only be granted in order to prevent irreparable mischief, or to prevent or suppress continual, oppressive, or vexatious litigation. *Silliman v. Hudson River Bridge Co.*, 4 Blatchf., 395; s. c., 5 Wall., 408. *S. P. Brown v. Carolina Central R'y Co.*, 83 N. C., 128.

² CITED. *Parker v. Winnepiscogus Lake, Cotton, &c. Co.*, 2 Black, 552.

Such temporary injunction will be granted, where the obstruction about to be made is likely to become a public nuisance, for the protection of the defendants themselves. *Silliman v. Hudson River Bridge Co.*, *supra*.

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looking into the said highway, were darkened ; and for an abatement of the nuisance. The court granted a perpetual injunction, defining the limits of the highway, and requiring the appellant to remove the nuisance.

The material facts of the case were as follows. John Fitzgerald and Valentine Peers, on the 25th of April, 1778, received a conveyance of lot 51 in the town of Alexandria, between which and the water of the Potomac River there was "sunken ground," which, on the 17th of September, 1778, was conveyed by William Ramsay and John Carlyle, in their own *right, and as trustees of the said town, to the said *11] Fitzgerald and Peers. A portion of this land was built upon by them, and that portion which extends from King Street on the north, running with Union Street on the west to the centre of an alley now called Dock Street, or Fitzgerald's Alley, and running to the Potomac River, with the building fronting on Union Street, was, by various deeds, transferred to and vested in Thomas Irwin, the father of the appellant. Thomas Irwin was in under his purchase in the year 1802, and continued so to his death, which happened in the month of January, 1827. By his will, he directed that all his estate should be equally divided between his children, when his son William (the appellant) should arrive at the age of twenty-one ; in the meantime to be managed for their benefit, by his sons Thomas, James, and William.

A division of the estate was made on the 15th of January, 1835, by which there was assigned to James Irwin a warehouse, on the south side of King Street, and *fronting the river* ; beginning on King Street, at the northeast corner of said warehouse, and running thence southwardly, with the east front of the same, to the centre of the south wall, between which wall and the warehouse south of it (by this deed allotted to Ann J. Carey) is an alley or open space ; then, with the centre of said south wall, westwardly, to the east side of the east wall of a warehouse by this deed assigned to William H. Irwin ; then northwardly, with the said east side of the said last-mentioned warehouse, and the east side of the warehouse hereby assigned to Mary Irwin, to King Street ; thence eastwardly, on King Street, to the beginning : the said warehouse being part of a lot of ground conveyed to said Thomas Irwin, deceased, by William and J. C. Herbert, and by the devisees and trustee of John Dunlap. On the 20th of April, 1835, James Irwin conveyed all his real estate in the county of Alexandria to William L. Hodgson, to secure his brother, William H. Irwin. On the 28th of February, 1842, James Irwin, to secure the payment of certain debts

therein mentioned, with the consent of William H. Irwin, conveys to John Hooff "all his, the said James Irwin's, right, title, and interest in and to the warehouse situated at the foot of King Street, and then in the occupancy of John Howard, which property was conveyed to the said James Irwin by deed of partition between the heirs of the late Thomas Irwin, deceased, made and executed in the year 1831, and was afterwards conveyed in trust to the said Thomas Irwin, to secure his mother, Elizabeth, for what she had become responsible. Elizabeth Irwin also united in this *deed. James Irwin, having failed to pay the debts [*12 intended by the last-mentioned deed to be secured, the trustee, John Hooff, set up, pursuant to the deed, and sold the property to the appellees, who complied with the terms of sale, and Elizabeth Irwin thereupon united with Hooff in a conveyance of the property, describing it as fronting on the Potomac River." James and William H. Irwin did not join in the execution of this deed.

The Dixions thus claimed to have all the estate, right, title, and interest of James Irwin in this property, and this was the foundation of their private right.

It further appeared from the record, that, at the time Thomas Irwin purchased the property, there was a large warehouse at the corner formed by Union and King Streets, and between that and the river was an open space or lot, extending along the line of King Street about ninety feet, to a dock at the foot of King Street. In the year 1804, he built the warehouse now owned by the Dixions, fronting on King Street and on the Potomac River. At one period of time, a very large trade was carried on in these premises, and for years the whole business of the house was transacted through the door in the east front, looking to the river.

The whole property on which the buildings stand forms nearly a square, the west side of which is on Union Street, the north on King Street, the south on a public alley, called Fitzgerald's Alley, and on the east was an open space running along the front of the buildings from King Street to, and passing beyond, this alley. This space is formed artificially, and made solid, and is upwards of forty feet in breadth before the wharves which project into the river, or the docks running by the side of the wharves to this open space, are reached. That part of the open space lying immediately adjacent to the eastern front of the Dixions' property was paved with brick to the width of about four feet, beyond which, and running along the line of this pavement from King Street to Fitzgerald's Alley, there is a passage for carts and passengers,

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which is commonly used, and has never been purposely obstructed since the erection of this house, in 1804.

After the purchase by the Dixions of the said warehouse, the said William H. Irwin erected a wooden fence eight or ten feet high, inclosing a space nearly twenty-five feet square, the north side of the inclosure embracing one of the windows on the ground floor in the east part of the building, and projecting eastward at right angles to the house, and then southward, and westward, and back to the wall of the other *13] warehouse erected *by William Irwin, so that it impaired the access to the Dixions' house, and obstructed their lights, and also completely interrupted the passing along the foot-way, and greatly obstructed the use of the carriage-way.

The Dixions filed their bill to restrain Irwin, and prevent his erecting this inclosure, and put their right on the ground of his darkening their ancient lights; and, also, that he was obstructing a public highway. The injunction was ordered and served. Irwin persisted in completing the erection, and they amended their bill, setting up distinctly that Thomas Irwin in his lifetime had dedicated to the public the use of that part of this open space covered by said inclosure, and the same had been used by the public as an open street and common highway, and the use of which had been consented to by all the persons interested in said property, and by the different owners of the fee simple of the lots of ground adjoining and bounding thereon, and by those heretofore claiming title to the said warehouse and lot now owned by the Dixons, and that the same had been used by the public as a common highway and open street for upwards of thirty years, for carriages, horses, wagons, and drays of every description, to pass, or stand upon to receive lading, and for doing business of merchandise, or other business.

The answer of William H. Irwin describes the fence erected as extending from a post near the Dixions' house, east 26 feet, then south 26 feet, then west 26 feet, about 10 feet high; but denies that it is erected on any public street or strand, or on land over which the public have any right of way.

And denies that it covers any part of complainant's window, and also denies that it diminishes in any perceptible degree the light passing through it.

That the fence is exclusively on a lot assigned by the deed of partition to James Irwin, W. H. Irwin, and A. I. Carey, in common,—the whole property consisting of five warehouses in a single block (the main building comprising three, resting

on the west on Union Street, on the north on King Street, and on the south on Dock Alley, and the two wings extending east from the east side of the main building, with an open space between them), and of the wharf lot and pier, which commenced at the eastern walls of the two wings, and extended unto the river. By the deed of partition the northern wing was assigned to James Irwin, the southern wing to A. I. Carey, the middle open space, in connection with the middle warehouse of the main building, to W. H. Irwin, and the wharf lot and pier, or open space to the east, to the three in common,—*on which open space is the erection [*14 complained of, the Dixions having purchased the northern wing.

That this open space had been reclaimed from the river by artificial filling up, requiring constant repair,—was of a perishable quality,—had always been kept in repair exclusively by Thomas Irwin and his predecessors and heirs,—who had at all times openly and notoriously asserted their exclusive ownership over the lot by excluding people from it, by covering it with merchandise, and by renting it especially to the tenant of the Dixions' warehouse to be used in connection with it.

That it had been kept open for the convenience of the owners solely, in connection with the wharf; and that the passage of people over it had been by leave and sufferance, and not as of right, but in subordination to the rights of the owner.

He denies positively all the allegations of the bill tending to show the dedication of that space, or any part of it, and also denies the existence of any street, strand, highway, or passway of any kind for the public over any part of the wharf lot.

He admits that the inclosure partially obstructs passage over said lot, but that there is still ample space for passage between the fence and wharf for every purpose.

He states that notice was given at the sale that only the building was sold,—no right existed beyond the wall,—but that the whole open space was private property.

That the interest of A. I. Carey in Thomas Irwin's estate was settled to her separate use prior to the partition by deed of 10th of August, 1829; W. H. Irwin's interest in the warehouse and wharf lot and pier was settled to the separate use of his wife on her marriage in 1839; and that James Irwin had conveyed his warehouse and interest in the wharf lot to secure W. H. Irwin for certain debts still due to full value of property.

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That he acted as agent of the owners in erecting the fence.

That an agreement, referred to in and virtually forming part of the deed of partition, expressly stipulates for the building on the open space by any two of the owners.

If any right be invaded, he denies that it causes such irreparable injury to complainants as entitles them to relief in equity, and avers that the remedy at law is adequate.

He suggests that "fronting the river" is matter of description, to distinguish the warehouse given to James Irwin from others, not giving it any right beyond the limits granted.

Much evidence was taken on both sides to show the use of the lot by the public and by the owner, the application of *15] *which will appear by referring to the arguments of the respective counsel.

In October, 1846, the counsel for the defendant, Irwin, moved the court to award an issue to be sent for trial to the Circuit Court of the District of Columbia, on the common law side thereof, to ascertain whether the space of ground lying between the east end of the complainant's warehouse in the bill mentioned and the Potomac River, or any part thereof, had ever been dedicated by any fee simple owner thereof, as a highway, to the use of the public, or whether any, and what, part thereof had been so dedicated; and if any part thereof had been so dedicated, when the same was so dedicated.

But the said court overruled the said motion, and refused to award the said issue as prayed, or any issue relating to the dedication of the said space, or any part thereof. To which said refusal the defendant excepted and objected.

The cause then came on to be heard upon the original and amended bills of the complainants, the answer of the defendant, and the exhibits and proofs filed by the parties, when the Circuit Court passed the following decree:—

"Being fully satisfied that Thomas Irwin, the ancestor of said defendant, did, in his lifetime, dedicate to the public use a highway passing along the eastern front of the said warehouse mentioned in said complainants' bill, and running from King Street to Dock Street, or Fitzgerald's Alley, in the town of Alexandria, and that the same was used as a highway for many years before the filing of the said bill; that there was next to the said warehouse, and within the said highway, a footway about four feet wide, beyond and next to which was a highway for the passing and repassing of carts, carriages, drays, and horses, and the same was commonly used by all

persons having occasion to use the same : and being further fully satisfied that the said defendant did, before the filing of the said bill, erect across the said highway a fence, which he has continued to this day, fully obstructing the passage along the said highway ; that the said fence is immediately adjacent to the east wall of the said house, between two of the windows in the said east wall, and close to the frame of one of said windows ; that the said fence was a special and material injury to the use and enjoyment of the said defendant's said warehouse, and is a continuing injury to the same, do, this 31st day of October, 1846, adjudge, order, and decree, that the injunction heretofore issued in this cause be, and the same is hereby, made perpetual. And they do further order and direct, that the said defendant do forthwith take down and remove the said fence, and that *he be, and he is hereby, for ever hereafter, so long as the said footpath and [*16 highway shall be continued to be used as such, enjoined and prohibited from erecting or putting any obstruction in the said highway within the space of nineteen feet wide, measured east from the eastern wall of said warehouse of said complainants, and running from King Street to Dock Street, or Fitzgerald's Alley, as it is indifferently called and known ; which said nineteen feet is hereby declared to be the eastern limit of said highway, and said highway does extend no farther east ; and that the said defendant pay the costs of this suit, to be taxed by the clerk."

From this decree, Irwin appealed to this court.

The case was argued by *Mr. Jones* and *Mr. Davis*, for the appellant, and by *Mr. F. L. Smith* and *Mr. Bradley*, for the appellees.

On the part of the appellant it was contended,—

1. The complainant's evidence does not prove a dedication. No witness testifies to an actual dedication. Nor is any such uninterrupted user as of right by the public, and acquiescence by the owners proved, as justifies the inference of a dedication.

All the answers to this point not excepted to state in general and stereotyped phrase that the wharf lot "has been used as a common and public highway," &c. ; but when asked, the witnesses "do not know whether so used by license or as of right, and several state the piling of goods, &c., over the open space by Thomas Irwin and the owners, and their receipt of wharfage therefor,—and their ignorance of any permanent obstruction, and of any prohibition against its use by the public.

No witness that it was in fact a street, or that it was known and considered or called such, and the title "strand" is one of complainant's own suggestion, while several say there was no street there.

It does not appear that any permanent erection obstructed the space.

It does not appear that any person at any time asserted a right to pass over or remain on the ground in opposition to Mr. Irwin.

The defendant proved,—

1. That Thomas Irwin, and those claiming under him, did, by words and acts, assert their right of property in, and of control over, the wharf lot, without dispute.

2. That it was generally reputed their property.

*17] *3. That they occupied it for commercial purposes, covering it with lumber, goods, wood, &c., &c.

4. That it was made ground, of perishable quality, and kept in repair by them.

5. That they assumed and exercised a discretionary right of removing persons from the property, but did not churlishly exclude persons from passing, when not inconvenient.

6. That it was assessed to them as private property.

7. That it was essential that the wharf lot should be left uninclosed for convenient use, and the passage was kept open for that purpose.

8. That the pavement was short,—only before and for the use of the warehouse purchased by Dixon,—not from street to street; and put there since T. Irwin's death.

9. That the wharf lot and pier—the whole designated as the wharf—was rented to vessels and steamboats, at the customary wharfage, for landing goods and passengers, who necessarily passed over said space to reach the streets, thus giving it the appearance of being a public thoroughfare, when in reality people only exercised a privilege paid for, implying no public right.

10. That the Dixions' house fronts on King Street, and so does not require a right of way over this lot; and the wharf being private property, they could not reach the river over it, but by defendant's permission.

11. That the Dixions purchased with full notice of the rights of defendant's principals to the open space, and subject to the agreement.

12. That the injury to the warehouse of the Dixions from the fence was not serious and irreparable, but slight and trifling.

13. That the light was not in any perceptible degree excluded from the window, or, if at all, not materially lessened.

14. That property similarly situated, and open, on other parts of the wharves of Alexandria, is treated as private property, and built on at pleasure.

Whereupon the counsel for the appellant contended,—

I.—1. That a fee-simple title to the warehouses, wharf lot, and pier in Thomas Irwin, his predecessors, and heirs, is proved.

2. That no express dedication is shown, and, on the contrary, it is disproved by the answer and otherwise.

3. That user is only evidence whence the court are to infer a dedication.

4. That, to form a sufficient foundation for that inference, it must have been uninterrupted, peaceable, with the knowledge and acquiescence of the fee-simple owner, and as of right.

*5. And that any fact, act, or public declaration, [*18 showing that the owner did not acquiesce in the user by the public as of right,—did not mean to abandon his right to the public,—is sufficient to prevent the acquisition, by virtue of the user, of a right of way. *Nichols v. Aylor*, 7 Leigh (Va.), 546; *Stafford v. Coyney*, 7 Barn. & C., 257; 14 E. C. L., 39, 40, 41; *Skeen v. Lynch*, 1 Rob., 186; *Jarvis v. Dean*, 3 Bing., 447; 13 E. C. L., 45, 46; *Wood v. Veal*, 5 Barn. & Ald., 454; 7 E. C. L., 158; *Gray v. Bond*, 2 Brod. & B., 671, 672, 667; *Denning v. Roome*, 6 Wend. (N. Y.), 651, 655–658; *New Orleans v. United States*, 10 Pet., 713; *Cincinnati v. White's Lessee*, 6 Pet., 431; *Barclay v. Howell*, 6 Pet., 498, 502, 503; *Harper v. Charlesworth*, 4 Barn. & C., 574; *Woodger v. Hadden*, 5 Taunt., 126; 1 E. C. L., 34, 38, 41; 2 Stark. Ev., 380, 381; *Gray v. Bond*, 2 Brod. & B., 667; Law of Easements, 83, 84; *Commonwealth v. Low*, 3 Pick. (Mass.), 408; 2 Stat. at L. (Act of 1804, § 5); *Rex v. Wandsworth*, 1 Barn. & Ald., 63; *Br. Museum v. Finnis*, 5 Car. & P., 460; 8 Ad. & El., 99.

If any dedication be proved, it is of a general right of passage, over some part of the lot, liable to be varied at the convenience of the owners, though not to be cut off entirely, and not of a way next the house; but this, as also the decree, is at variance with the pleadings.

II. If the dedication be sufficiently proved, still no such irreparable damage, irremediable at law, and sufficient to give equity jurisdiction, is proved. 2 Story, Eq., §§ 923, 924, 926; 17 Ves., 617, 623; 4 H. & M., 474; *Gardner v. Newburgh*, 2 Johns. (N. Y.) Ch., 165; *Georgetown v. Alex. Canal Co.*, 12 Pet., 97, 99; *Van Bergen v. Van Bergen*, 3 Johns. (N. Y.)

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Ch., 282, 287; *Parker v. Smith*, 5 Car. & P., 438; *Back v. Stacey*, 2 Id., 465; Law of Easements, 285, 315, 319; *Attorney-General v. Nichol*, 16 Ves., 338; 2 Russ., 121.

III. That the court should have awarded a trial at law. Law of Easements, 314, 315, 316; *Weller v. Smeaton*, 1 Cox, 102; *Wynstanley v. Lee*, 2 Swanst., 336; *Robinson v. Ld. Byron*, 1 Bro. C. C., 588; *Attorney-General v. Cleaver*, 18 Ves., 211; *Crowder v. Tinkler*, 19 Ves., 622, 627; *Sutton v. Ld. Montfort*, 4 Sim., 559; 6 Johns. (N. Y.) Ch., 439.

IV. Prescription for ancient windows is here impossible, owing to unity of possession in Thomas Irwin, and no other ground of right is alleged or proved. *Morris v. Edgington*, 3 Taunt., 24.

V. There is no obstruction of light, either in mode or extent, as gives equity jurisdiction. *Attorney-Gen. v. Nichol*, 16 Ves., 338; 2 Suppl. to Ves., 340; *Wynstanley v. Lee*, 2 Swanst., *333; *Parker v. Smith*, 5 Car. & P., 438; *19] *Back v. Stacey*, 2 Id., 465; Law of Easements, 285, 134, 135; *Martin v. Goble*, 1 Campb., 320, 323.

VI. That proper parties have not been made. Story, Eq. Pl., § 231; *Osborn v. Bank of U. States*, 5 Cond. R., 742, 760; *M'Namara v. Williams*, 6 Ves., 143; *Le Tenier v. Mary. of Anspach*, 15 Ves., 164, 165; 1 Dan. Ch. Pr., 301, 302; 2 Atk., 515.

VII. That Dixon is bound by the stipulations of the agreement referred to in the partition, and estopped from controverting the right of defendant's principals, to build on the wharf lot. *Carver v. Jackson*, 4 Pet., 83, 86, 88, 58; *Denn v. Cornell*, 3 Johns. (N. Y.) Cas., 174; *Crane v. Morris and Astor's Lessee*, 6 Pet., 611, 612; *Mason v. Muncaster*, 9 Wheat., 445; *Ben v. Peete*, 2 Rand. (Va.), 540, 542, 546, 547; 2 Lomax's Dig., 209; 2 Barn. & Ad., 278; *Shelly v. Wright*, Willes, 9; 1 Stark. Ev., 206 n.; 4 Pet., 83; *Burnett v. Lynch*, 5 Barn. & C., 589; *Burleigh v. Stibbs*, 5 T. R., 465, 466; *Habergham v. Vincent*, 2 Ves., 227, 228; *Higginson v. Clowes*, 15 Ves., 522; Story's Eq. Pl., § 572; 5 Sim., 640; 14 Ves., 211, 214.

On the part of the appellees it was contended,—

First. There may be a dedication of a right of passage to the public without any formal deed or writing. *Lade v. Shepherd*, 2 Str., 1004, cited and approved by this court in *City of Cincinnati v. The Lessee of White*, 6 Pet., at pages 437 and 438, and this last case at length. See this doctrine reviewed and affirmed in 10 Pet., at pages 712, 713.

Second. This dedication may be inferred from notorious acts of user, with the knowledge of the owner of the fee.

Valentine v. Boston, 22 Pick. (Mass.), 75. The enjoyment of such use by the public for a period beyond the statute of limitations creates a right in the public. *Valentine v. Boston*, 22 Pick. (Mass.), 75, 80; *Barclay v. Howell*, 6 Pet., 513. And the breath or extent of the highway is a question of fact, to be collected from the circumstances of the case. *Sprague v. Waite*, 17 Pick. (Mass.), 309; *Hannum v. Belcherstown*, 19 Id., 311.

Besides, in this case, in the deed of partition between the heirs of Thomas Irwin, this warehouse is described as "fronting the river, beginning on King Street, at the northeast corner of the said warehouse, and running thence southwardly with the east front of the same"; and in the deed to the Dixons, as "fronting on the Potomac River." The proof, too, is full, that for a series of years, and almost from the period of its erection, this was the principal business front through which the transactions of the house were carried on, and there was a *brick pavement along that front. [*20 These are all controlling circumstances to show that a thoroughfare running along the front was contemplated by the owner, and used by the occupants of the house and the public. These facts give to that description a definite and precise meaning. William H. Irwin and Mrs. Carey were parties to the deed of partition; and in the description of the warehouse assigned to Mrs. Carey, the first line is given to begin "at the southeast corner of said warehouse on said alley, then north with the east front of the same." In the same deed of partition, it will be seen in the allotment to William H. Irwin, express power is given to him to close the windows on the south side of James's and the north side of Mrs. Carey's warehouses, looking into the alley between them, which alley also is assigned to William H. Irwin; and also, on the same page, "the warehouse fronting east on said wharf allotted to Ann J. Carey" is specially referred to. No authority is given to obstruct, in any manner, the openings and windows on these "east fronts," or to raise those walls any higher. These are satisfactory proofs of a conveyance, bounding on some open space between the houses and the river. It is a front boundary. "Front," in the common usage of the word in relation to town property, necessarily imports access. The deeds of partition, therefore, and the mesne conveyances to the Dixons, contain language necessarily, *ex vi termini*, importing an access to the eastern entrances into these buildings, and, coupled with the other circumstances, show a clear intent to recognize a common highway. If so, the rule is clear, and it is a complete dedication if there

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were none before. 1 Hill (N. Y.), 189; Id., 191; 19 Wend. (N. Y.), 128.

Nor is it necessary, in such a case, that the user should have continued twenty years. *Barclay v. Howell*, 6 Pet., 513.

Third. The evidence in this case shows that Thomas Irwin, being the owner of the soil, opened a passage over it from King Street to Dock Street, along the eastern front of this house; that he did not, by any visible distinctive mark, show that he meant to preserve all his rights over it, nor did he exclude persons from passing at pleasure, but did permit the public for nearly thirty years, and his heirs, after his death, for more than ten years additional, to pass and repass, as in a common highway, over the passage thus opened by him; and this is a dedication of such use to the public. *Rex v. Lloyd*, 1 Campb., 262; *Jarvis v. Dean*, 3 Bing., 447; *Daniel v. North*, 11 East, 372, opinion of Le Blanc, and note (a); *Rex v. Barr*, 4 Campb., 16; *Aspindall v. Brown*, 3 T. R., 265.

Fourth. The right to a free passage over the highway is *21] all *the public acquires; the fee remains in the original grantor, and he may necessarily use it, and exercise every right and control over it not inconsistent with the free passage given to the public. Com. Dig., tit. *Chimin.*, let. A. 1; *Barclay v. Howell*, 6 Pet., 513, 514; *Lade v. Shepherd*, 2 Str., 1004.

The acts of ownership supposed to have been proved on the part of Thomas Irwin and his heirs, and as negating this right of way, if consistent with the public use to which it was dedicated, do not in any degree impair that public right. They are, he used it "as any and every other person"; "kept it in repair at his own cost"; would not let cartmen and draymen stand their drays and carts on the ground, being unwilling to have the ground stamped and trodden into holes; "drove off persons with their drays or carts"; "horses standing there with drays or carts stamped the ground into holes; and in fly-time created great annoyance"; he would "take a whip from some of those near him, and go and drive off some half dozen of the carts and drays, and if the drivers grumbled at it, he would tell them to go and stand on the corporation grounds, for which they paid taxes; that they paid nothing for standing on the space from which he drove them; piled wood there, leaving room for carts to pass." He paid taxes for the whole ground, not discriminating between this highway and the residue of the property. These acts are all entirely consistent with the dedication to, and use of the highway by, the public. *Lade v. Shepherd*, 2 Str., 1004; Com. Dig., tit. *Chimin.*, let. A. 3.

Nor is it any answer to say, he was the owner on both sides of the highway, and kept it open for his own use.

1. He did not in any way limit or restrict it. 1 Campb., 262.

2. The deed of partition separated the property, and the use previous to and following upon that deed clearly defines what the rights of the parties under that deed should be. 1 Hill (N. Y.), 189, 191; 19 Wend. (N. Y.), 128.

Fifth. We assume that we have shown a highway, and the right of the Dixons to a "front" on that highway, and to ancient windows looking out upon it. It is beyond dispute, that W. H. Irwin, by the fence and building complained of, obstructed the highway, impaired that front, and injured those ancient lights. This gives the right to a remedy by injunction, at the instance of the party thus injured. It is a public nuisance, by which also private parties are directly injured, and an injunction is the proper remedy. *Corning v. Lowerre*, 6 Johns. (N. Y.) Ch., 439. And the principle is stated in *Crowder v. Tinkler*, 19 Ves., 617, 623; *Spencer v. Lond. and Birm. R. R. * Co.*, 8 Sim., 193; *Sampson v. Smith, Id.*, [*22 272; and see *Corporation of Georgetown v. Alexandria Canal Company*, 12 Pet., 91, 98, 99. And see the cases in 3 Dan. Ch. Pr., 1858 and notes.

Sixth. The court was right in defining the limits of the highway. The proof of the pavement is quite clear. It was four feet wide. The proof of a highway wide enough for two carts or drays to pass each other is equally clear. The court allowed fifteen feet for this highway, in addition to the four feet for the footpath. This is the least space which could be used for that purpose, and allows but seven feet and a half for each cart. The space between the warehouse and the dock is about forty feet, and the space left for the passage of the public was "fifteen or twenty feet." The anchors were piled so as to fill up about half way.

A jury would have the right to find the limits of the highway. *Hannum v. Belchertown*, 19 Pick. (Mass.), 311; and see the cases cited under the fifth point.

Seventh. The court was right to order the nuisance to be abated and removed, and to make the injunction perpetual; because, at the time of the service of the first injunction, the obstruction was incomplete, and the appellant proceeded to finish it in direct contempt of the court. *Van Bergen v. Van Bergen*, 2 Johns. (N. Y.) Ch., 272; *East India Co. v. Vincent*, 2 Atk., 83; *Ryder v. Benthams*, 1 Ves. Sen., 542.

And it is clearly one of the great objects of this jurisdiction, when the public and private injuries are combined, to

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cause the nuisance to be abated peaceably, and to prevent its recurrence.

The corporate authorities of the town of Alexandria have possessed and exercised control over the streets and highways in said town ever since its incorporation. They also limit and regulate the wharves. The various acts of the General Assembly of Virginia, except the act of 1782, hereinafter referred to, and the acts of Congress, the first establishing and incorporating, and the latter amending, the charter of the town of Alexandria, will be found collected in Davis's Laws of the District of Columbia.

The town of Alexandria was established in 1748. (See Davis's Laws, p. 533.) Sixty acres of land were appropriated for its location, on the south side of the Potomac River, the meanders of the river forming its eastern boundary. In 1762, (Davis, 536,) the trustees of the town were authorized to convey to settlers certain lots embraced within specified boundaries, "beginning at the corner of the lot denoted in *23] the plan *of said town by the figures 77, and extending thence down the river."

In 1779, the town of Alexandria was incorporated (Davis, 541). At page 542, the power is given to the mayor, recorder, and aldermen, "to assess the inhabitants for the charge of repairing the streets and highways." In 1782, an act was passed (see Henning's Statutes at Large, Vol. II., p. 44), giving to the corporate authorities of Alexandria the power, which they are required to exercise, "to open and extend Water Street through the said town, from north to south, as far as the limits of the said town extend, and also to lay off Union Street, from north to south, as far as the limits of the said town extend." By an act of Congress approved May 13th, 1826 (Davis, 385, 386), Alexandria having been then ceded to the general government, power is given the Common Council of said town "to erect, repair, and regulate public wharves, deepen docks and basins, and to limit the extension of private wharves." Congress had previously, by an act approved February 25, 1804 (Davis, 161, 163), conferred on the Common Council of Alexandria power "to pave, make, and repair the streets and highways."

The ground claimed as a highway is no part of the wharf alleged to belong to the heirs of Thomas Irwin, but an open strand, or slip of ground, between the first range of warehouses and the wharves. The paper referred to as defendant's exhibit five gives, and can give, no authority to create a public nuisance. The highest legislative power can confer

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no such right. Besides, the paper has no bearing on the points at issue in this cause.

The deed of partition among the heirs of Thomas Irwin provides that they "have agreed to make partition of the real estate, land, annuities, and rent charges devised to them as aforesaid, from their father, the said Thomas Irwin, deceased, and do, by these presents, make full, perfect, and absolute partition of all and singular, the same, as is more particularly allotted and described in the schedule hereto annexed, as a part of this deed, with each, all, and every the rights, privileges, and appurtenances, grants, covenants, claims, and conditions whatsoever, to each and all of the said lots, pieces of ground, annuities, and rent charges belonging, or in any case appertaining," &c.

The warehouse purchased by the Dixons was, under this deed of partition, allotted to James Irwin, and by him conveyed in the manner stated. We submit, that, upon the severance of the estate by the deed of partition, the privilege of access to the eastern front of the warehouse, and of the right of way *along said front, which existed during the unity [*24 of the estate, passed by implied grant to James Irwin, and by subsequent conveyances to those holding under him. See 3 Kent, Com. (6th ed.), p. 434, and note (c), referring to Gale & Whatley's Treatise on Easements, p. 49; 1 Green (N. J.), 57; Law of Easements, 38-52. A like principle applies as to the enjoyment of ancient rights. 1 Saund. Pl. & Ev., 81, and cases there cited.

Under the grant of the warehouse and lot to the Dixons, there passed whatever was necessary to its beneficial use and enjoyment. The rule of law is well settled, that a right of way, or other appurtenant to land, will pass by a grant of the land, without any mention being made of the easement or appurtenant. *Kent v. Waite*, 10 Pick. (Mass.), 141; *United States v. Appleton*, 1 Sumn., 492; 3 Kent, Com. (6th ed.), p. 420; *Hazard v. Robinson*, 3 Mason, 272; *Plant v. James*, 5 Barn. & Ad., 791; *Jackson v. Hathaway*, 15 Johns. (N. Y.), 447; *Truehart v. Price*, 2 Munf. (Va.), 468.

The appellees insist that the evidence conclusively proves that the obstruction erected by William H. Irwin is a public nuisance, and that it is not rendered less a nuisance by the assertion that there is still left a passway in front of their warehouse. Whatever obstruction narrows a highway, or renders it less commodious, is a nuisance. 4 Bac. Abr., 214, tit. *Highways*; 16 Vin. Abr., tit. *Nuisance* (B), p. 20; *The King v. Russell*, 6 East, 427; *Dimmett et al. v. Eskridge*, 6 Munf. (Va.), 308.

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Further to sustain the first point in brief, we cite 3 Kent, Com. (6th ed.), p. 428, n. (a), 450, 451, notes (a) and (b), and cases there cited; *Galatian v. Gardner*, 7 Johns. (N. Y.), 106; Gale and Whatley on Easements, p. 52 (n. 6); *Beatty et al. v. Kurtz et al.*, 2 Pet., 568; *McConnell v. Trustees of the Town of Lexington*, 12 Wheat., 582; *Town of Powlett v. Clark*, 9 Cranch, 331; 2 Stark. on Ev. (ed. 1830), tit. *Highway*, pp. 663-666; *Vick et al. v. Mayor of Vicksburg*, 1 How. (Miss.), 379; *Trustees of Watertown v. Cowen*, 4 Paige (N. Y.), 510; *Cleveland v. Cleveland*, 12 Wend. (N. Y.), 172; 19 Pick. (Mass.), 405; 4 N. H., 1.

Under the fourth point in brief, we cite 3 Kent, Com. (6th ed.), pp. 432, 433, 434, and notes to those pages.

In addition to the cases cited in brief, point fifth, we refer the court to 3 Kent, Com. (same ed.), p. 448; 2 Story, Eq. Jur., §§ 925, 926, 926 (a); 1 Madd. Ch. Pr., 155; Jeremy, Eq. Jur., 310, 311.

To sustain the seventh point in brief, 2 Story, Eq. Jur., § 924, and cases there cited.

*25] *We further maintain, that William H. Irwin is the only necessary party defendant; because the case is one of malfeasance only. The title to the ground over which was the highway, and where the obstruction was erected, was not involved. *Lowe v. Munford*, 14 Johns. (N. Y.), 426; *Sumner v. Tileston*, 4 Pick. (Mass.), 308; *City of Cincinnati v. White*, 6 Pet., 442.

That the Dixions gave a fair value for the warehouse, with the right of way and access to the eastern front, as it had existed for forty years. See the valuation of the real estate of Thomas Irwin, at p. 167 of the record. The warehouse described as being in the occupancy of A. G. Fleming is that which was purchased by the Dixions at \$2,860, whereas it is there valued at \$2,200.

As to appellant's third point, see Story's Equity, 1478, 1479.

Mr. Justice WOODBURY delivered the opinion of the court.

This was an appeal from a decree in the Circuit Court of the District of Columbia for the County of Alexandria.

The proceedings on which the decree was entered had been in substance as follows.

The Dixions, September 6, 1844, filed a bill in chancery, setting out their purchase, in October, 1843, of a certain warehouse in Alexandria, "with all the rights and appurtenances to the same belonging," and that they had since been

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in quiet possession of the same; that this warehouse "fronts, on the east, the River Potomac, and the doors and windows of said front open on a strand, which has been used uninterruptedly as a public highway for upwards of thirty years"; that said strand or street is the great thoroughfare for that part of the town between the river and the last range of warehouses fronting thereon, and "has always been used as a common and public highway for the free and uninterrupted passage and intercourse of the public"; and that said warehouse and doors and windows "have been erected upwards of thirty years, without any effort or claim heretofore to obstruct the same."

The bill then charged, that William H. Irwin, on the 5th of September, 1844, prepared materials and employed carpenters to close up and obstruct the doors and windows of the plaintiffs, thus situated, claiming the right to do the same, and intends forthwith to nail plank over it, or build a fence "just in front of the said warehouse, whereby its use and value would be greatly and seriously injured"; and, unless prevented, it "will cut off all direct intercourse between the said front and the said public strand and the River Potomac."

They therefore prayed an injunction to prevent it, [*26 alleging it would amount to a nuisance, and constitute an irreparable injury to their property, and asked further to have it abated, if already erected. An amended bill was afterwards filed on the 21st day of September, 1844, as if at that time original, and varying from the first bill chiefly by describing the fence as then erected, and over eight feet high, and obstructing a window in the warehouse, and extending in front of it about eight feet; and averring that Irwin had refused to obey the temporary injunction already issued. It also alleged, that a dedication of this land had been made to the public by the respondent and his predecessors, and an easement thereby accrued to the public over it; and that the fence was both a private and public nuisance, and caused to the complainants irreparable damage.

The answer of the respondent, filed in April, 1846, admitted the erection of a fence near the place, as alleged in the bill, and constituting an inclosure about twenty-six feet square, but denied that it obstructed, "in any perceptible degree," the light of any of the windows of the complainant, or stood on any public highway. On the contrary, the answer averred that it stood on the "wharf property and pier," which belonged to him, his brother James, and sister Ann, in common, from their father's estate; and which had always been claimed, used, and belonged to their father and

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them as private property. After many further allegations in defence, and putting in various exhibits and much evidence on both sides, as appears in detail in the statement of this case, the Circuit Court declared itself to be fully satisfied that Thomas Irwin, the ancestor of the said defendant, did in his lifetime dedicate to the public use a highway passing along the eastern front of said warehouse, &c., "and that the same was used for many years before the filing of the said bill, and that there was next to the said warehouse, and within the said highway, a foot-way about four feet wide, beyond and next to which was a highway for the passing and repassing of carts, carriages," &c., "and the same was commonly used by all persons having occasion to use the same." "And being further fully satisfied that the said defendant did, before the filing of said bill, erect across the said highway a fence, which he hath continued to this day, fully obstructing the passage along the said highway," and, being built immediately adjoining said warehouse and its windows, that it was a special and material injury to the use and enjoyment of the warehouse, the court did adjudge, order, and decree, "that the injunction heretofore issued in the cause *27] be, and the same is *hereby, made perpetual." The court further ordered, that the fence be removed by Irwin, and that he be enjoined from obstructing in any manner said highway "within the space nineteen feet wide measured east from the eastern wall of said warehouse," &c.

It will be seen that the decree below proceeds chiefly on the ground, that a legal public highway exists, running nineteen feet wide east of the warehouse and immediately contiguous to the same, and that a wrong has been done by the respondent by obstructing that highway. It is true, that the decree speaks also of the obstruction being injurious to the warehouse and private rights of the plaintiffs, and so does the bill. But the gravamen of both is the existence of a public highway where the fence runs.

In our opinion, whether looking to the private or public rights and privileges which are alleged to be obstructed, this proceeding cannot be sustained. The state of some of the circumstances renders the injunction asked here not a proper form of remedy for the supposed damage to any private interests, and the principal ground of complaint for a public as well as private wrong in preventing travel across the alleged highway is not satisfactorily made out by showing clearly the existence of such highway.

As to the first ground of objection. This form of remedy was one much questioned, as permissible either to the public

or an individual, in the case of a public right of this kind invaded. 3 Myl. & K., 180; 2 Johns. (N. Y.) Ch., 380; 16 Ves., 138. And when at last deemed allowable, it was only where the community at large, or some individual, felt interested in having the supposed nuisance immediately prostrated on account of its great, continued, and irreparable injury; and it was then used as a sort of preventive remedy to a multiplicity of suits, and in cases where an action at law would yield too tardy and imperfect redress. *Osborne v. United States Bank*, 9 Wheat., 840, 841; 14 Conn., 581; 21 Pick. (Mass.), 344; *Eden on Injunction*, ch. 11; 7 Johns. (N. Y.) Ch., 315; *Jerome v. Ross*, 17 Conn., 375; 3 Myl. & K., 177; 1 Story, Eq. Jur., 25. When, however, delay can safely be tolerated, the usual remedy in such cases, by or in behalf of the public, is an indictment rather than an injunction. 12 Pet., 98; Bac. Abr., *Nuisance*, D.; Co. Litc., 56, a; 19 Pick. (Mass.), 154; Willes, 71; *Wilkes's case*, 2 Bing., N. R., 295, 281; 1 Id., 222; 2 Story, Eq. Jur., 923. And no remedy whatever exists in these cases by an individual, unless he has suffered some private, direct, and material damage beyond the public at large; *as well as [*28 damage otherwise irreparable. Hawk. P. C., ch. 75; *Rowe v. Granite Bridge*, 21 Pick. (Mass.), 344; *Stetson v. Faxon*, 19 Id., 147, 511; 1 Penn. St., 309; 6 Johns. (N. Y.) Ch., 439; *City of Georgetown v. Alex. Can. Co.*, 12 Pet., 97, 98; 2 Ld. Raym., 1163; *O'Brien's case*, 17 Conn., 342; and *Bigelow's case*, 14 Conn., 565; 3 Dan. Ch. Pr., 1858; *Spencer v. London and Birm. R. R. Co.*, 8 Sim., 193, and *Sampson v. Smith*, Id., 272; 12 Pet., 98; 18 Ves., 217; 2 Johns. (N. Y.) Ch., 382.

In cases of injury to individual rights by obstructions or supposed nuisances, an injunction is still less favored, and does not lie at all permanently, in England and most of the States, unless the injury is not only greater to the complainant than to others, and of a character urgent and otherwise irremediable at law, but the right or title to raise the obstruction is not in controversy, or is first settled at law. (See cases hereafter.) When all these prerequisites exist, an individual, rather than only a public officer, has been allowed in chancery to obtain a perpetual injunction, though for a supposed public nuisance. 2 Story, Eq. Jur., 924; 6 Johns. (N. Y.) Ch., 439. But it is better for him, whether the nuisance be public or private, when the injury is not great and pressing, to resort for redress to a private action at law; and such, though not the only course, is the one most appropriate and safe. (See same cases, and others in Bac. Abr. *Nuisances*,

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B; *Wynstanley v. Lee*, 2 Swanst., 337.) In this last case, much like the present, an injunction was refused. So *Attorney-General v. Nichol*, 16 Ves., 339, and *Wilson v. Cohen*, 1 Rice (S. C.) Ch., 80. One reason for this is the peculiar damage to him beyond that to others, which must be proved, when the extraordinary remedy by injunction is sought in his name either for a private or public nuisance. Another is, the great, pressing, and otherwise irremediable nature of the injury done, which must also be then proved, and which is not entirely without doubt in the present case.

But more especially is this form of remedy not expedient to be adopted, unless indispensable from the character of the damage, as an individual is not in point of law allowed at first any thing but a temporary injunction to preserve the property uninjured till an answer can be filed admitting or denying the right of the plaintiff, and, if doing the latter, till a trial at law can be had of that right, when desired by the defendant or deemed proper by the court. And when the right or title to the place in controversy, or to do the act complained of, is, as here, doubtful, and explicitly denied in the answer, no permanent or perpetual injunction will usually be granted till such trial at law is had, settling the contested *29] rights and interests of the parties. *2 Swanst., 352; 2 Johns. (N. Y.) Ch., 546, in *Johnson v. Gere*; *Storm v. Mann*, 4 Johns. (N. Y.) Ch., 21; *Akrill v. Selden*, 1 Barb. (N. Y.), 316; *Crowder v. Tinkler*, 19 Ves., 622; *Weller v. Smeaton*, 1 Cox, 102. See *Parker et al. v. Perry et al.*, 1 Woodb. & M., 280; 2 Story, Eq. Jur., §§ 927, 1479; 1 Ves. Sr., 543; *Rider's case*, 6 Johns. (N. Y.) Ch., 46; 3 Dan. Ch. Pr., 1850 and 1860; *Woodworth v. Rogers*, 1 Railr. Cas., 120; 19 Ves., 144, 617; Bac. Abr., *Injunction*, A; *Anonymous*, 1 Bro. C. C., 572; 3 Meriv., 688; 1 Bland (Md.), 569; 1 Vern., 120-270; Ambl., 164; *Drewry on Inj.*, 182, 238; 17 Ves., 110; 8 Id., 89; 2 Bro. Ch., 80; 2 Ves., 414; 7 Id., 305; *Birch v. Holt*, 3 Atk., 726; 3 Johns. (N. Y.) Ch., 287; *Higgins et al. v. Woodward et al.*, 1 Hopk. (N. Y.), 342; *Attorney-General v. Hunter*, 1 Dev. (N. C.) Eq., 12; 8 Sim., 189; 14 Conn., 578; *Hilton v. Granville*, 1 Craig & P., 283, and *Harman v. Jones*, Id., 299, 302; *Ingraham v. Dunnell*, 5 Metc. (Mass.), 126; 6 Pick. (Mass.), 476; *Wynstanley v. Lee*, 2 Swanst., 355; *Yard v. Ford*, 2 Saund., 172; *Birm. Can. C. v. Lloyd*, 18 Ves., 515 and 211. The true distinction in this class of cases is, that, in a prospect of irremediable injury by what is apparently a nuisance, a temporary or preliminary injunction may at once issue. 1 Coop. Sel. Cas., 333; *Earl of Ripon v. Hobart*, 3 Myl. & K., 169, 174-179; 6 Ves., 689,

n.; 7 Port. (Ala.), 238; *Hart v. Mayor of Albany*, 3 Paige (N. Y.), 213; *Shubrick v. Guerard*, 2 Dessaus. (S. C.), 619; 1 Craig. & P., 283; 4 Sim., 565. in *Sutter's case*. But not a permanent or perpetual one till the title, if disputed, is settled at law. 1 Paige (N. Y.), 97; *State v. Mayor of Mobile*, 5 Port. (Ala.), 280, 316. (See authorities last cited.) In some of the States it is understood that the practice in this last respect is otherwise. In the celebrated case of *The United States Bank v. Osborne*, 9 Wheat., 739, it will be seen, that the answers (742, 743) did not deny the title of the plaintiffs, and the Chief Justice says (858),—"The responsibility of the officers of the State for the money taken out of the bank was admitted." But a case entirely in point on this difficult question in this tribunal is *The State of Georgia v. Brailsford et al.*, 2 Dall., 406-408. There, a temporary injunction issued, not to pay over money "till the right to it is fairly decided." And on an issue to a special jury, the trial was had before a final decision was made on a permanent injunction. 3 Dall., 1 and 5. This condition of things as to the form of the remedy adopted here, where the damage was so small and the right was in controversy, is very unfavorable to the correctness of the final decree in the court below, awarding a perpetual injunction to the plaintiffs on their private account, and more especially so far as it rested on any private rights to any part of the open space.

*But beside these objections to the course of proceeding followed in this case, the chief foundation for relief of any kind which is set up here seems to fail. It is the allegation and decree that a public highway exists in front of the warehouse of the plaintiffs. This seems to us unsupported by the evidence and the law. [*30]

There is no claim that such a highway was ever legally laid out by the city or county of Alexandria. But the plaintiffs in the court below rely for its existence chiefly, if not entirely, on a user of it by the public as a highway for more than thirty years. The counsel for the plaintiffs have placed it in argument, as is one ground in the amended bill, on the principle that it showed a dedication of the *locus in quo* to the public for a highway, as well as furnishing presumptive evidence, not rebutted here, of a title in the public of a right of way there by long user. First, as to the dedication. It is true that this may at times be proved by a use of land, allowed unconditionally and fully to the public for a period of thirty years, or even less. *Cincinnati v. White*, 6 Pet., 481; 22 Pick., 78-80. In *Jarvis v. Dean*, 3 Bing., 447, the public use had been only four or five years, but with the owner's

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assent. See also 6 Pet., 513. "Such use, however," says Justice Thompson in 6 Pet., 439, "ought to be for such a length of time that the public accommodation and private rights might be materially affected by an interruption of the enjoyment"; and if the time of the use by the public be long, as, for instance, over twenty years, and unexplained, the presumption is strong for a dedication. *McConnell v. Trustees of Lexington*, 12 Wheat., 582; 3 Kent, Com., 445; 6 Pet., 513; 10 Pet., 718.

There is, then, no difficulty here in deciding that the length of time of the user was enough, it having been twenty or thirty years.

But the dedication must also be under such circumstances as to indicate an abandonment of the use exclusively to the community by the owner of the soil. 4 Campb. N. P., 16; 1 Id., 262; 11 East, 370; 3 T. R., 265; *Jarvis v. Dean*, 3 Bing., 447; 22 Pick. (Mass.), 75. Hence there must not have been, as here, repeated declarations made by the owner inconsistent with any dedication. 7 Leigh (Va.), 546, 665; *Livett v. Wilson*, 3 Bing., 116.

Nor must the acts and words be equivocal or ambiguous on that subject.

In short, the idea of a dedication to the public of a use of land for a public road must rest on the clear assent of the owner, in some way, to such dedication. *Nichols v. Aylor*, 7 *31] Leigh (Va.), 546; *Johnson's case*, 8 Ad. & E., 99; 1 Hill (N. Y.), 189, 191; 19 Wend. (N. Y.), 128; 3 Bing., 447; 1 Campb. N. P., 262; 6 Pet., 431, 3 Kent, Com., 445; *Sargent v. Ballard*, 9 Pick. (Mass.), 256. This assent may be proved by a deed or unsealed writing expressing such assent, or, as no fee in the land, but only an easement generally is given, it may be by parol or by acts inconsistent and irreconcilable with any construction except such consent. 6 Pet., 437; 10 Pet., 712; 3 Kent, Com., 428, 450; 7 Johns. (N. Y.), 106; 2 Pet., 508; 12 Wheat., 582; 9 Cranch, 331; 4 Paige (N. Y.), 510; 12 Wend. (N. Y.), 172; 19 Pick. (Mass.), 406; 4 Mason, 1.

Thus, it has been presumed, if one makes a plan of his land in a city with certain streets laid down between certain lots, and sells the lots accordingly, that he thus means to dedicate those streets to the public. See *United States v. Chicago*, 7 How., 196, and cases cited there from Wendell; *White v. Cower et al.*, 4 Paige (N. Y.), 510; *Barclay v. Howell's Lessee*, 6 Pet., 506; *New Orleans v. United States*, 10 Pet., 718. And more particularly is it so if the community are allowed to begin to occupy the streets accordingly. *Cincin-*

nati v. White, 6 Pet., 431 ; 10 Pet., 718. But a mere survey of such streets, without selling the contiguous lots or letting the streets be occupied, is not enough. 7 How., 196.

It is not pretended that in any way has such consent been given here, except by the acts before referred to, and done under the explanatory circumstances accompanying them. Thus, though there is much evidence, that, from the warehouse eastward to the river and wharf, the land has been open or uninclosed for twenty or thirty years, and that people and carriages have usually travelled over it in going to and from the warehouse and wharf, yet during that time, till the sale of the warehouse to the plaintiffs, that and the open space and wharf have all been owned by one person, and he has used them in any manner deemed by him most proper.

On that sale the titles to each became vested in different persons, and this controversy arose about the use of the open space from the warehouse to the wharf, an undivided share in which space and wharf remained in the respondent, and none of it *eo nomine* was conveyed to the plaintiffs. If any private right or privilege to use any part of it for any purpose passed to the plaintiffs, it must have been under the word "appurtenances," in their deed from Irwin of the warehouse and its appurtenances.

But as the construction of the deed in that respect, and of the facts, as showing any privilege used here by the owners of the warehouse as belonging to the warehouse, rather than to their interests in the open space and wharf as separate property, cannot be now properly under consideration, as before explained, in a private application for perpetual injunction against an alleged nuisance, when the damage is not great nor clearly irreparable, and the right or title to erect it is still in controversy, we do not examine and decide on the merits, as to any private interests supposed to be obtained by that deed. And the question recurs on the other and chief ground for the application and decree,—the existence of a public highway where the fence was erected.

The idea of a clear intent to dedicate the *locus in quo* for that purpose, which we have seen is necessary to sustain it by dedication, is further repelled, as before in part suggested, by the very circumstances, that this space while open and thus used was designed for the owner's purposes, rather than for the purposes of others ; that it was while the owner of the open space and wharf was the owner of the warehouse also, and had a right to use both for himself ; and that, the moment the new owner of the warehouse ceased to have a title to the soil itself in the open space and wharf, the right

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to use them freely, either by him or the public, was questioned and resisted. Besides this, the space, being open for many years, was manifestly convenient, if not necessary, for the accommodation and interests of the owners of all this property, the wharf without this open space being hardly susceptible of any profitable use, and the warehouse not so accessible.

While, then, any body might be allowed to travel over this space from the warehouse east to the wharf and river, when convenient and not injuring the owner, it would not be because it had been intended to give to the public a right of way over these premises, but because he himself intended to travel over it, and while so doing, and so leaving it open, would not be captious in preventing others from travelling there.

This was not meant to give to others any exclusive rights or privileges there, but merely a favor in subordination to him and his rights, as will be clear from various other circumstances during the twenty or thirty years.

As proof of this, he and his father, before the sale, were accustomed to use this open space for other private purposes, such as piling wood and lumber, anchors, tobacco, &c., as well as for a passage to and from their wharf; they uniformly continued to pay taxes on it, as if entirely private property and not given to any public use, and the city continued to assess taxes on it to them as owners, rather than refraining *38] to do it, as *in case of highways generally; they made repairs on it when needed, as if open for their own use and advantage, instead of its being repaired by the city, as was done with public highways; and they required persons to remove themselves, horses, and carriages from it, when causing damage or giving offence, and stating at the time virtually that no public privileges existed there.

As soon, likewise, as William Irwin had no further occasion to keep open the western portion of this open space for his own use and benefit, as owner of the warehouse, he fenced it up. Circumstances like these seem entirely inconsistent with the idea that any intended dedication had been made of these premises, or the use of them, to the public. The effect of these circumstances is to undermine and destroy also the other ground set up by the bill, as well as the decree below, that a public highway had been established there, not by dedication, but by over thirty years' use of the land for that purpose by the community.

In order to have a use or occupation accomplish this, it must have been adverse to the owner (3 Kent, Com., 444), whereas this was by his consent. It must, also, have been

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an exclusive use by the public, whereas this was in common with him for travel, and entirely in him for several purposes of a private character. It must have been, also, acquiesced in by the owner, and not contested and denied, as here. *Nichols v. Aylor*, 7 Leigh (Va.), 547.) It should likewise, in that event, have been treated by the public authorities as a highway in connection with the user and occupation, so as to give notice it was meant to be so claimed; whereas this was not repaired by the city, nor left untaxed to the owner, as in other cases of public roads.

From the very nature of wharf property, likewise, the access must be kept open for convenience of the owner and his customers; but no one ever supposed that the property thereby became public instead of private, and especially under such numerous and decisive circumstances as existed here rebutting such an inference.

No length of time, during which property is so used, can deprive an owner of his title, nor give to the community a right to enjoin or abate the owner's fences over it as a nuisance, on the ground that they have acquired a legal easement in it. Finally, it is to be recollected that an injunction is what is termed a transcendent or extraordinary power, and is therefore to be used sparingly, and only in a clear and plain case. *Rosser v. Randolph*, 7 Port. (Ala.), 238, 245; 3 Johns. (N. Y.) Ch., 48 (*semble*); 3 *Myl. & K., 180, [*34 181; *Bigelow v. Hartf. Bridge Co.*, 14 Conn., 580.

The decree below cannot, under these views, be sustained, on any of the grounds which have been urged in its support. It must, therefore, be reversed, and the case remanded, with instructions that the bill should be dismissed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the county of Alexandria, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs; and that this cause be, and the same is hereby, remanded, with instructions to dismiss the bill of complaint, in conformity to the opinion of this court.

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RICHARD WALDEN AND OTHERS, HEIRS AND REPRESENTATIVES OF AMBROSE WALDEN, DECEASED, APPELLANTS, v. THOMAS BODLEY'S HEIRS AND REPRESENTATIVES, ROBERT POGUE'S HEIRS AND REPRESENTATIVES, AND OTHERS.

SAME v. SAME.

This court having sent a mandate to a Circuit Court to put a party into possession of certain lands which were the subject of an ejectment suit, it was right in the Circuit Court not to extend the possession further than the land originally recovered in ejectment, although other lands were afterwards drawn into the controversy.¹

Where a defendant in ejectment alien the property in dispute whilst the proceedings are pending, a possession by the vendee will not justify a plea of the statute of limitations. This court having issued an order, after the expiration of the demise, that the Circuit Court should place the plaintiff in possession, such an order proceeded on principles governing a court of equity, and the Circuit Court was bound to conform to it.²

THESE two cases were brought up by appeal, from the Circuit Court of the United States for the District of Kentucky.

The cases were exceedingly complicated, and cannot be understood without a reference to the following plat.

*35] *The history and facts of the case are given so much in detail in the opinion of the court, that it is unnecessary to do more than refer the reader to that opinion, as delivered by Mr. Justice Catron.

It was argued by *Mr. Underwood* for the appellants, and *Mr. C. S. Morehead* for the appellees. The only question was, whether or not the Circuit Court had properly executed the mandate of this court, and the arguments of the counsel are noticed with sufficient clearness in the opinion of the court, as well as the facts in the case.

Mr. Justice CATRON delivered the opinion of the court. These two cases were appeals from the Circuit Court of

¹ It is the duty of the Circuit Court to carry into execution, literally, the directions contained in the mandate, if they be precise and unambiguous. *West v. Brashear*, 14 Pet., 51; *Williams v. Gibbs*, 20 How., 535. And see *Ex parte Morris*, 9 Wall., 605.

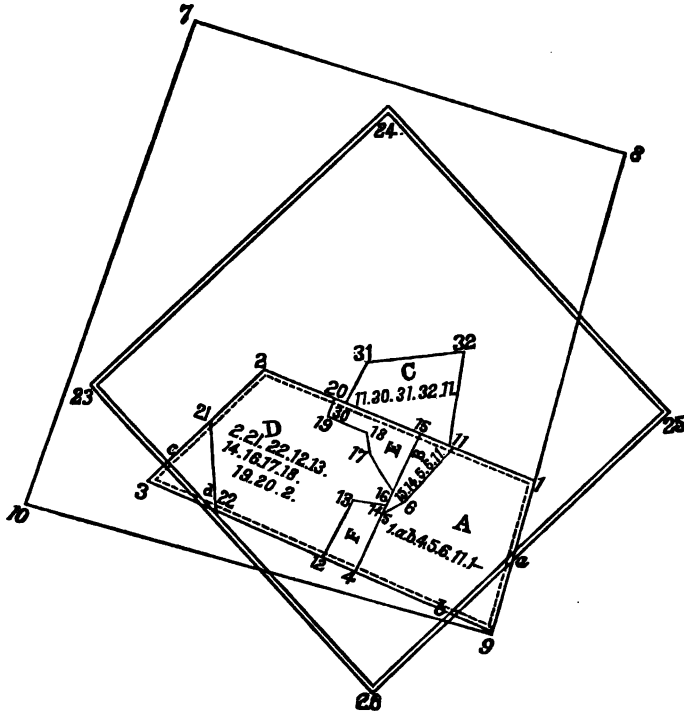
Though the court below is bound to follow the instructions given to it by the mandate, yet where a mandate has plainly been framed, as regards a minor point, on a supposition which

is proved by the subsequent course of things to be without base, the mandate must not be so followed as to work manifest injustice. On the contrary, it must be construed otherwise, and reasonably. *Milwaukee and Minnesota R. R. Co. et al. v. Soutter*, 2 Wall., 510.

² *S. P. Society for Propagation of the Gospel v. Town of Hartland*, 2 Paine, 536.

the United States for the District of Kentucky, sitting as a court of equity. They were in fact one case, and will be treated as such.

The question was, whether the Circuit Court had properly executed the mandate of this court issued after the decision in *a cause between the same parties in January term, 1840, and reported in 14 Pet., 156. The judgment of [*36



this court in the ejectment suit between Walden's lessee and Craig's heirs, involving the same title, settled the questions raised therein, and was final.

The ejectment case will be found in 14 Pet., 147. The present difficulty arose from the execution of the mandate of this court in the chancery suit.

In order to give a clear understanding of the nature of the dispute, it is necessary to refer to the plat, and disembarrass it of all the locations which are unconnected with the present appeal. After explaining the pretensions of the appellant, it will become necessary to give an historical narrative of the case in all its diversified aspects, because the grounds of de-

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fence relied upon by the appellee cannot be understood without such an explanation. The dispute was of very long standing. The title of Walden was collaterally brought before this court in 5 Cranch, 191, then directly in 9 Wheat., 576, 14 Pet., 156, and now reappears in 9 Howard.

The mandate issued in 1840 will be more fully stated here after. At present it is only necessary to say, that it commanded the Circuit Court to take such further steps in regard to the putting of Walden in possession of the premises recovered in the ejectment suits as should be conformable to the decree hereby affirmed, and to the principles of equity.

The appellant Walden complained that the Circuit Court had not put him in possession of the tracts of land marked A, B, and C, which it ought to have done, bounded as follows:—

A. 1, *a*, *b*, 4, 5, 6, 11, 1.

B. 15, 14, 5, 6, 11, 15.

C. 11, 30, 31, 32, 11.

Each of these pieces of land had its separate defence. A brief explanation of the plat now becomes necessary.

The double lines 23, 24, 25, 26, are the lines of Walden's entry, as the same were laid down by a surveyor under the order of this court, and therefore Walden could recover nothing outside of them.

7, 8, 9, 10, are the lines of his original patent, as laid down by him.

The dotted lines 1, 2, 3, 9, represent the locator's or Craig's part. But as these lines include land outside of the entry, they must be made to conform to it, and therefore assume an irregular figure, running from 1, *a*, *b*, *d*, *c*, 2, 1.

It will be explained hereafter upon what grounds the defendants claimed to hold A, B, and C on the accompanying plat.

*37] *To return to the history of the case.

1780, entry by Walden.

1783, entry by Bodley's grantors.

1785, survey by Walden.

1790, survey by Bodley's grantors.

In March, 1797, Walden brought an action of ejectment for a tract of land lying on the waters of Johnson's Fork of Licking River in Mason County. The action was brought in the District Court of the United States for the Kentucky District. The declaration stated a demise for the term of ten years from the 15th day of August, 1789.

In March, 1798, Lewis Craig and Jonathan Rose were sur-

stituted in place of the casual ejector, confessing lease, entry, and ouster.

In June, 1800, a special case was submitted to the court, accompanied with a survey. From these documents, it appeared that a division of the land covered by Walden's patent had been made in February, 1794; that two thirds of it had been assigned to Walden, and the remaining third to Craig, as assignee of Simon Kenton, the locator; and that the defendants in the ejectment were in possession of that part which had been given to the locator.

The case was submitted to the court upon this agreed state of facts.

On the 19th of June, 1800, the court gave judgment for Walden, the plaintiff in ejectment.

In August, 1800, Walden sued out a writ of *habere facias possessionem* upon this judgment. This writ was arrested by an injunction, and returned unexecuted; and again renewed in 1811, as will be mentioned in chronological order.

In September, 1800, Bodley and others filed a bill upon the equity side of the court, and obtained an injunction. This bill is nowhere found upon the record, and its contents cannot be more particularly stated.

In May, 1809, this bill was dismissed for want of jurisdiction.

On the 5th of September, 1811, the execution which had been taken out by Walden in 1800 was returned, and another writ of *habere facias possessionem* issued upon the 14th of September.

In the latter part of September, 1811, Bodley and others filed another bill, and obtained a second injunction to stay further proceedings upon the judgment in ejectment.

At May term, 1812, the injunction was dissolved, on hearing on bill, answers, depositions, and exhibits, and in April, 1813, the complainants dismissed their bill.

*On the 2d of June, 1812, Walden sued out another writ of *habere facias possessionem* which was superseded on the 8th of June, upon two grounds; namely, that no execution ought to have issued, on account of the lapse of time after the rendition of the judgment, and because the demise laid in the declaration had expired before the judgment was given. [*38]

At July term, 1813, the writ was quashed.

In August, 1817, a rule was laid upon the defendants, Craig and Rose, to show cause why the demise in the declaration should not be extended.

On the 22d of May, 1819, Walden took out another writ

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of *habere facias possessionem*, which was afterwards quashed by the court.

At November term, 1821, the rule came up for argument, when the court overruled the motion to extend the demise. Walden sued out a writ of error, and brought this judgment up to this court to be reviewed. It came up for argument at February term, 1824, and is reported in 9 Wheaton, 576. This court having expressed its opinion that the motion to extend the demise ought to have prevailed in the Circuit Court, leave was granted by the Circuit Court, at the ensuing May term, to amend the declaration by extending the demise to fifty years.

In March, 1825, Bodley and Pogue obtained a decree against Walden in the Fleming Circuit Court of Kentucky (State court), upon a bill which they had filed against him to prevent him from proceeding further in his action of ejectment. The decree was founded upon the superior equity in the claim of Bodley and Pogue, inasmuch as Walden's survey in 1785 interfered with the prior entry of the grantors of Bodley and Pogue, in 1783.

In 1825, Bodley and Pogue filed a bill in the Circuit Court of the United States, into which court were removed all the proceedings of the Fleming Circuit Court just mentioned. Upon this bill an injunction was granted, prohibiting Walden from proceeding further under his judgment in ejectment. Walden answered, and afterwards filed a cross-bill and an amended cross-bill.

In 1833, the suit was revived by consent, in the names of the heirs and representatives of Bodley and Pogue, who had died.

In May, 1835, Thomas Blair, who claimed under Pogue, filed a petition in the Circuit Court to reverse and annul the order extending the demise, upon the ground that the order was surreptitiously obtained and improvidently made.

*39] In May, 1836, the court overruled this motion to annul the extension of the demise.

On the 18th of November, 1836, Walden sued out a writ of *habere facias possessionem* for a part of the land claimed in the original ejectment. On the ensuing day, being the 19th of November, the defendant's counsel moved to quash this writ, upon the ground, amongst other reasons, that it was irregular to issue the writ without a previous *scire facias*, because the judgment had been obtained twenty years before. On the 21st of November, the court quashed the writ.

In March, 1837, Walden sued out a *scire facias* to revive the judgment. Blair was made a defendant, as tenant in

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possession. The defendants demurred to the *scire facias*, and also pleaded *nul tiel* record. The court gave judgment for the defendants upon the demurrer and the plea, and the case was brought up to this court by a writ of error. It was decided at January term, 1840, and is reported in 14 Pet., 147.

In the mean time, the bill filed in the Circuit Court by Bodley and others, in 1825, had ripened into a decree. After various proceedings, the Circuit Court, at November term, 1834, decreed, that Walden had the superior equity to all the land included within the double black lines, and numbered 23, 24, 25, 26, and that for other lands lying outside of these lines, and within the lines of his patent, he should execute deeds to the complainants.

Upon the subject of damage and waste, rents and profits, and improvements, the court appointed commissioners to go upon the land and make assessments.

At May term, 1836, the report of these commissioners was quashed, and other commissioners appointed.

This decree of the Circuit Court was appealed from by Walden, brought up to this court, and is reported in 14 Pet., 156. The decree of the court below was affirmed, and the cause returned with the following mandate:—

“Whereas, lately, in the Circuit Court of the United States for the District of Kentucky, before you, or some of you, in a cause between Thomas Bodley's heirs, Robert Pogue's heirs, and others, complainant, and Ambrose Walden, defendant, the decree of the said Circuit Court was in favor of the said complainants, and against the defendant, as by the inspection of the transcript of the record of the said Circuit Court, which was brought into the Supreme Court of the United States by virtue of an appeal, agreeably to the act of Congress in such case made and provided, fully and at large appears. And whereas, *in the present term of [40 January, in the year of our Lord one thousand eight hundred and forty, the said cause came on to be heard before the said Supreme Court on the said transcript of the record, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decrees of the said Circuit Court be, and the same are hereby, affirmed, with the modification that this cause be, and the same is hereby, remanded to the said Circuit Court, with directions to that court to take such further steps in regard to the improvements, and to the putting of Walden or his representative in possession of the premises recovered in

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the ejectment suits, as shall be conformable to the decree hereby affirmed, and to the principles of equity.

"You, therefore, are hereby commanded, that such further proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

"Witness the Honorable Roger B. Taney, Chief Justice of said Supreme Court, the second Monday of January, in the year of our Lord one thousand eight hundred and forty.

"WM. THOS. CARROLL,
Clerk of the Supreme Court of the United States."

Upon the receipt of this mandate, the Circuit Court took steps to execute it by granting leave to both parties to take depositions, ordering the surveyor to amend his survey, if necessary, and report matters of fact specially.

At November term, 1841, Walden's death was suggested, and a bill of revivor filed on behalf of his heirs, which included a prayer to revive the proceedings in the suit wherein Walden was defendant, to which the mandate referred, and also the proceedings under the cross-bill which had been filed by Walden. Whereupon, subpoenas were issued to bring fifty-six parties into court, who were the representatives of Bodley, Pogue, and the other persons whose interests were opposed to Walden.

After another bill of revivor, and another amended bill, and sundry other proceedings, the cause came before the Circuit Court for final adjudication at May term, 1847. The court ordered the heirs of Walden to be placed in possession of several of the pieces of land claimed, but refused to give them those pieces marked upon the preceding plat with the letters A, B, and C. An appeal was taken from this decree by the heirs of Walden, and the correctness of this refusal by the Circuit Court was the question brought up by the appeal.

As each one of the tracts A, B, C, had a different defence, it will be necessary to enumerate them in order.

*41] "A. The judgment of the Circuit Court respecting this tract was as follows, viz. :—

"It seems to the court that the heirs of Walden are not entitled to obtain, by this proceeding against John N. Procter, the possession of the parcel of land designated on the plat of the survey by the letters and figures 1, a, b, 4, 5, 6, 11, 1; it was acquired of one of the complainants in the original bill, but at a time when there was no litigation pending. Jonathan H. Rose purchased this land in 1814, of Jonathan Rose, then

in possession for upwards of seven years under a junior patent, and thereupon took possession, and resided upon it until he sold it to Proctor, the defendant, who resided upon it until about the time of the commencement of this proceeding, when he sold it to Kincaid, now in possession. And it seems to the court that the possession so held by Jonathan H. Rose, and his successor, Proctor, for upwards of seven years before the original bill in this case was filed, and upwards of twenty years before he was in any wise a party to any litigation concerning the land, does constitute a bar under the statute of limitations, and that this part of the case is within the exception of the decree, and mandate of the Supreme Court, and that the Waldens are not, upon the principles of equity, entitled to have the possession of this part of the land; and therefore their bill and proceedings in respect to it are dismissed.

It will be perceived by a reference to the plat, that the whole of this tract of land lies within both Walden's entry and patent, and also within what was called the locator's part. This court in 1840 decided that Walden's title was good to all the land included within his entry, namely, all included within the double black lines: and decided also, that Craig's title, claimed under Kenton, the locator, was not valid. 14 Peters, 162. It remains to trace the title claimed under the defence of limitations.

The title adverse to Walden's is thus traced by the counsel for Proctor, the present occupier and claimant.

After the expiration of the demise in said Walden's declarations, namely, in the latter part of the year 1800, as your petitioner is advised, Rose, the tenant in possession, purchased the land claimed by said Walden from Bodley and Pogue, who claimed under a patent in the name of Tibbs & Co., for 10,000 acres of land, posterior in date to that of said Walden, and adverse thereto, for which he held the bond of said Bodley and Pogue for 131 acres, which bond was satisfied by the execution of a deed, September, 1821.

Between the years 1814 and 1819, and while the said *demise continued dead, your petitioner believes about [42 the year 1816 or 1817, said Rose sold by executory contract the said tract of land to his son, Jonathan H. Rose, and delivered the possession thereof to him; and the said Jonathan H. Rose continued on said land, and was in fact the terre-tenant at the date of the extension of the demise, namely, the 8th of May, 1824; and the said Jonathan H. had no notice or knowledge whatever of said extension, but the whole proceeding as to him was *ex parte*. And your petitioner states, that during the year 1826, he purchased by

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bond of said Jonathan H. Rose, and took possession of said land in March, 1827; and shortly afterwards received a deed therefor from said Rose, without any knowledge on his part of the extension of said demise, and when, as he is advised, the title of said Rose had ripened into a complete estate.

The said Lewis Craig was not a terre-tenant, but was entered defendant with Rose on account of his sale to said Rose of the land in contest.

It was upon the 2d of July, 1827, that Jonathan Rose executed a deed, with special warranty, to Jonathan H. Rose; and on the 22d of February, 1828, Jonathan Rose and Jonathan H. Rose united in a deed to Proctor. The *habendum* of the deed was as follows:—

“To have and to hold the land hereby conveyed, and the appurtenances, unto the said Proctor, his heirs and assigns, for ever. The said Jonathan Rose only conveying, without warranty, a life estate which he held by virtue of a lease from said Jonathan H. Rose; and the said Jonathan H. Rose, for himself, his heirs, executors, and administrators, the aforesaid tract of land and premises unto the said Proctor, his heirs or assigns, against the claim or claims of all and every person or persons whatsoever, so far as to refund the purchase money without interest in case said land should be lost by a better claim than the one thereby conveyed, does and will for ever defend by these presents.”

At the time of the last survey, this tract of land appeared to have passed into the possession of a person by the name of Kincaid; by what conveyance the record did not show.

B. The judgment of the Circuit Court with regard to the tract of land marked B was as follows:—

It seems to the court that the heirs of Walden are not entitled to obtain, by this proceeding against Blair, the possession of the parcel of land in his possession, which is designated in the report of the surveyor by the figures 15, 14, 5, 6, 11, 15, and as containing fifteen acres, one rood, and *43] seven poles. It *was purchased, and the possession obtained, from one of the original complainants in the original bill, but there was no suit pending for it or against it, and its possession cannot be affected by any subsequent litigation between parties out of its possession. Tilton and Huston purchased it in the year 1813 of Robert Pogue then in the possession, with his title under the junior patent, for upwards of seven years, and thereupon they took the possession; since which time it has been held in continued possession by them and their vendee, and his vendee, down to Blair, the defendant, now residing upon it; each and all hold-

ing adverse to Walden. And it seems to the court that this length of adverse possession, upward of seven years before the original bill, of which this proceeding is the sequel, was filed, and upwards of twenty years before Blair, or any other person in possession, became in any wise a party to the suit, or to any proceedings in respect to it, does constitute a bar under the statute of limitations, and that this part of the case is within the exceptions in the mandate, and the bill and proceedings of the Waldens, in respect to this part of the land, are dismissed; and this disposes of all the land for which judgments were recovered in the ejectment suits."

The origin of Blair's title to this piece of land is thus stated by himself in his answer, 1837, to the cross-bill, amended cross-bill, and bill of revivor, filed against him and others by Walden's heirs.

"This respondent has no personal knowledge whatever of the progress and movement in the various suits referred to, or of the derivation of Fitzgerald's title; but he is informed, and charges, that after the expiration of the demises in said Walden's declaration, and before the renewal thereof, that said Shockey sold the land in contest to Robert Pogue, who claimed it previously under the patent in the name of Tibbs, &c., for ten thousand acres of land, posterior in date to that of Walden, and adverse thereto; and said Pogue, who purchased in order to unite the conflicting claims in himself, then took possession of said land in contest, and continued the possession in himself until about the year 1814, when he sold the same to Tilton and Huston, who then entered and held the possession for two or three years, and then sold to Hambrick, who continued in possession until the demise was entered, and until he sold and delivered the possession of the same to your respondent."

In April, 1813, Pogue gave a bond of conveyance for this land to Tilton and Huston. In April, 1816, this bond was assigned to Hambrick, who assigned it to Fitzgerald. About the year 1829, Pogue gave a deed of it to Fitzgerald, and on the *20th of September, 1832, Fitzgerald conveyed it to Blair by a deed, the *habendum* of which was as follows:—

"To have and to hold the said tract or parcel of land above described, together with all and singular the privileges and appurtenances thereunto belonging, or in any wise appertaining to the same, unto the said Thomas Blair, his heirs and assigns, for ever, and to their only proper use and benefit and behoof. And the said Benjamin Fitzgerald, for himself, his heirs, executors, and administrators, doth hereby covenant to

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and with the said Thomas Blair, his heirs, executors, and administrators, that in case the land hereby conveyed shall be taken or lost by any better or prior claim, that in that event the said Fitzgerald will refund to him, the said Thomas Blair, the purchase-money thereof, without interest."

C. The judgment of the Circuit Court as to the tract of land marked C was as follows :—

"The Waldens have not, however, limited their claim in this proceeding to the boundaries of the four hundred acres of land which have been given as the limits of the lands recovered in the actions of ejectment, but have insisted that these judgments were for all the land within the patent of their ancestors, for 1,333 acres ; and that, whether this position be sustained or not, they are entitled, on the decree and mandate of the Supreme Court, to have themselves put in possession of all the land within, and common to, the patent and entry of their ancestor, as established by the decree of this court, to which it is not shown some other person has the superior title ; and they prayed on the hearing for process by which to have such possession delivered to them. Their prayer is overruled, and this proceeding dismissed as to Blair, and all the other parties, in respect to all the lands without the boundary of the land covered by the judgments in ejectment, designated on the plat as first herein stated.

"It is, however, provided, that neither these orders, nor what may be done in consequence of them, shall prejudice the rights of any of the parties, or their representatives, in the above-mentioned actions of ejectment, or in the suit in chancery, of which this proceeding is a continuation, who are not now properly before the court. It is ordered that an account be taken of the improvements, and of the rents and profits and damages, of each of the three above-described parcels of land, of which, according to the above opinion, the Waldens are to have the possession. John C. Herndon is appointed the master for this purpose "

It will be perceived by a reference to the mandate of this *45] court, which is above recited, that the Circuit Court was instructed "to take such further steps in regard to the improvements, and to the putting of Walden or his representative in possession of the premises recovered in the ejectment suits, as shall be conformable to the decree hereby affirmed, and to the principles of equity."

It is necessary to refer to the ejectment suits to see what premises were recovered.

The original ejectment, brought in 1797, was in very general terms, for 415 acres of land. After the substitution of

Craig and Chapin as defendants, instead of the casual ejector, the court ordered a survey of the premises according to the claim and pretensions of the respective parties. The defendants took defence for all the land included within the locator's part, as will be seen by the following special case and judgment of the court. The letters A, B, C, D are represented in the plat in this statement by the figures 7, 8, 9, 10, and the letters E, F, G, C, by the figures 1, 2, 3, 9.

"And afterwards, to wit, at the June term of the court aforesaid, to wit, on the 19th day of June, A. D., 1800, the following special case was admitted to the court, by consent of the parties herein, by their attorneys.

"The tract of land marked on the plat by the letters A, B, C, D, was duly granted to the said Walden, lessor of the plaintiff, by patent from the Commonwealth of Virginia, bearing date the 20th day of November, 1786.

"The said Walden and Simon Kenton executed the agreement, marked A, respecting the locating of said lands; the said agreement is made part of this cause.

"The defendants are in possession of that part of the tract marked on the plat by the letters E, F, G, C, and claim the said part of the said tract of land under the agreement A, and the indorsement thereon, and a division thereof made as certified by the report B; which report and indorsement on said agreement is also made a part of this case.

"If, upon the whole, the court shall be of opinion that the legal title to the said part of the said tract of land marked on the plat as aforesaid by the letters E, G, C, F, is in the plaintiff, then judgment to be entered for him; if not, judgment to be entered for the defendants.

"WILLIAM CLARK, *Attorney for Plaintiff.*

THOMAS TODD, *Attorney for Defendants.*

"And the court, having fully considered and understood the said case, is of opinion, that the legal title to the said part of *the said tract of land marked on the plat E, F, G, C, is in the plaintiff, and was on the day of filing the [*46 declaration in this suit.

"It is therefore considered by the court, that the plaintiff recover against the said defendants, Lewis Craig and Amzel Chapin, his term of and in the premises aforesaid, with the appurtenances, yet to come and unexpired, together with his costs by him in this behalf expended; and the said defendants in mercy, &c.

"And on motion of the plaintiff, by his attorney, the United

States writ of *habere facias possessionem* is awarded him in this suit, to cause him to have possession of the terms aforesaid, returnable to the next court."

The judgment in ejectment in favor of Walden did not therefore include the tract of land marked C, or any land outside of the locator's part, for which only the defendants took defence.

Thus far, the claim of the heirs of Walden, and the grounds of defence of the defendants, have been stated as to those parts of the tract of land which the Circuit Court refused to give to Walden's heirs.

It remains now to state the proceedings of that court with respect to the parts of the tract which were given to those heirs, and which are designated upon the preceding plat by the letters D, E, and F.

The Circuit Court gave these lands to Walden's heirs upon certain conditions, which will be mentioned consecutively, and from this part of the decree Walden's heirs also appealed.

D. The decree of the Circuit Court was as follows:—

"It therefore seems to the court that, on this proceeding against Benjamin Umstead, one of the complainants in the original bill, the heirs of Walden must have awarded to them the possession of the parcel of land designated, in the report of the surveyor filed herein at the present term, by the figures 2, 21, 22, 12, 13, 14, 16, 17, 18, 19, 20, 2, and as containing one hundred and forty-nine acres, twenty-eight poles, now in his possession, when he, Umstead, shall have been paid the amount which the value of the improvements upon the land exceeds the rents and profits and damages thereof, or it shall be ascertained that there is no such excess on the account to be taken. It does not appear that Umstead has had the possession of any other part of the land since the commencement of these proceedings; and as to the residue of the land in the proceeding, it is dismissed, without prejudice as to the parcel of land designated on the plat by figures 21, 3, 22, and 21, *47] containing, *according to the surveyor's report, fourteen acres, two roods, and thirty-six poles, sold by Umstead, as represented in 1813, and now in the possession of the widow of William Craig."

E. The decree of the Circuit Court with respect to this piece of land was as follows:—

"It seems to the court that the Waldens will be entitled, on the proceedings against the defendant, John N. Proctor, to have the possession of the land designated on the plat by the figures 15, 16, 17, 18, 19, 20, 15, and as containing nineteen

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acres, three roods, and twenty-eight poles, in his possession about the time of the commencement of this proceeding, but now in the possession of Jeremiah Wells. Proctor was not a party to the original bill, but he appears to have purchased this parcel of the land, and to have acquired the possession of it from Sandridge, one of the complainants in the original bill, pending the suit; and when the value of the improvements shall have been paid, or found compensated by the rents, profits, and damages of the land, according to an account which will be taken, the Waldens will be entitled to an order for process of possession. It does not exactly appear when Wells acquired the possession of this land; but he is no party, and unless his position be such as to bind him, he shall not be concluded in respect to any right or claim he may show in respect to the matter to be effected."

F. The decree of the Circuit Court with respect to this piece of land was as follows:—

"It seems to the court, that the Waldens will be entitled against the defendant, Thomas Blair, to have the possession of the land designated on the plat by the figures 4, 12, 13, 14, 4, and as containing fourteen acres, three roods, and eight poles. It is found in the possession of Blair, claiming to hold it by purchase from Pogue, one of the original complainants. He does not show when he made the purchase, or acquired the possession, and the fair conclusion is, that he obtained the possession pending the litigation. He must, therefore, surrender it when he shall have been paid the amount which the value of the improvements exceeds the rents and profits, with the damages, on the account which will be taken, or it shall appear that the result of such account must be against him."

When this cause was here in 1840, it was held that, as Walden had been decreed to surrender possession, and make releases of his elder legal title to complainants for so much of the land in controversy as their better right in equity covered, the proper condition imposed on complainants by such decree in their favor was, that, having received their measure of equity, they were compellable to do equity to the defendants; and *that therefore they should be constrained to sur- [*48
render possession to Walden's heirs of that part to
which their ancestor had the better title: and as this had not been ordered by the Circuit Court in the decree made in 1834 (then before us on appeal), it was so ordered by this court in 1840, as a proper addition to the decree made below; and the cause was sent down to have our mandate executed in this respect. In attempting to do so, it is insisted on part

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of Walden's heirs, that the Circuit Court erred to a material extent, and they have prosecuted their appeal to this court to correct the errors, and we are now called on to construe and execute our own mandate; beyond this, we have no power to go, more than the Circuit Court had. What that court ought to have done, it is our duty to do. The mandate directed the Circuit Court "to take such further steps in regard to the improvements, and to the putting of Walden or his representatives in possession of the premises recovered in the ejectment suits, as shall be conformable to the decrees hereby affirmed, and to the principles of equity."

Beyond the land recovered in the ejectment, we have no power to act under this mandate; nor to those parts of the land recovered, which were by the decree of 1834 vested in complainants and divested out of Walden. It follows, that the parcel on the plat marked C. 11, 30, 31, 32, 11, is not in the case now before us, it lying outside of the tract recovered in the ejectment suit; as to this parcel, the Circuit Court adjudged correctly, when executing the mandate, and therefore the decree is affirmed in this respect.

The parcel as found on the plat marked A. 1, a, b, 4, 5, 6, 11, 1, next presents itself for our consideration. It was occupied by Kincaid, claiming in some form under John N. Proctor; and the Circuit Court held that Proctor had acquired the better title thereto, by force of the act of limitations, which had barred Walden's right to recover it; and therefore the claim on part of Walden's heirs to have possession thereof surrendered to them was rejected. And the inquiry is, Did the statute of limitations operate in Proctor's favor? Jonathan Rose took possession under Lewis Craig. Rose was sued in ejectment, and recovered against, in 1800. By some executory contract, Jonathan Rose sold to Jonathan H. Rose, before 1817; and the two Roses seem to have held a joint possession, until they sold to Proctor in 1826. He took possession in 1827, and the two Roses made him a joint deed in 1828. In May, 1824, the demise in the ejectment suit was extended to fifty years, commencing in 1789. The suit then stood as if the demise had been originally laid for fifty years.

*49] Of this step, neither Jonathan Rose, nor Jonathan H. Rose could legally or justly complain. Proctor came in by purchase in 1827, and Kincaid afterwards. Then the ejectment suit was in full force against all these parties. Nor is there any thing in the fact that Jonathan Rose took a deed from Bodley and Pogue in 1821, seeking shelter under their inferior title. And this reduces the inquiry to the question, whether Proctor and Kincaid were bound by the proceedings

against Jonathan Rose? Walden had the legal title and right of possession. The ejectment suit was pending, and Walden delayed and hindered from obtaining the fruits of his judgment by the acts of Jonathan Rose; of this pending litigation, purchasers from Rose were bound to take notice; and they were bound as alienees, *pendente lite*, by the proceedings in the suit, after the alienation, as Jonathan Rose was bound. This is the general rule. *Long v. Morton*, 2 A. K. Marsh. (Ky.), 40; *Hickman v. Dale*, 7 Yerger (Tenn.), 149. And so is the rule in equity likewise. Story, Eq. Pl., 287. If it were true, that, when a recovery was had for land, the party in possession, and from whom the land had been recovered, might sell out and transfer his possession to another, and the latter could not be reached by a writ of possession, then there could be no end to litigation, as the land might be transferred on each successive recovery. And to hold that the alienee might avail himself of the act of limitations, and thereby defeat the action, or its fruits, by execution, if he and his vendor could, by bills of injunction, or other unjust contrivance, keep the plaintiff out for seven years, would equally violate the principle, that he who buys *pendente lite* must abide the judgment or decree against his alienor, regardless of the fact whether such purchaser was or was not a party to the suit.

Up to May, 1839, the judgment in ejectment was in full force against Proctor, Kincaid, and the Roses; then the demise expired. In 1840, this court ordered that Walden's heirs should be put into possession of the land recovered, because the legal remedy had ceased. That order proceeded on principles governing a court of equity; that it was a decree in effect against these parties, for the land above described, is our unanimous opinion; and the Circuit Court having held otherwise, we direct the decree of that court, in this respect, to be reversed, and order that Walden's heirs be put into possession of the parcel of land marked A. 1, a, b, 4, 5, 6, 11, 1, on the plat, of which the one here presented is a copy.

The next parcel claimed by Walden's heirs, to which their claim was rejected by the Circuit Court, is lot B, marked 15, *14, 5, 6, 11, 15, of 15 acres, 1 rood, and 7 poles, and [*50 defended by Thomas Blair. In tracing title of this tract, a material defect exists in the statement made by the Circuit Court. It was part of the Hambrick tract, and purchased by Robert Pogue from Abram Shockey after the recovery in ejectment; at what precise time, does not appear. Blair alleges in his first answer, that it was sold by Walden to A. Chapin, and by Chapin to Pogue; but in a second answer, Blair alleges that Pogue purchased of Shockey, and

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that Shockey was then in possession; "and that said possession was regularly continued through Pogue, Tilton and Huston, Hambrick, and Fitzgerald to your respondent, Blair."

The surveyor's return explains the matter as follows:—

No. 1. "15, 14, 5, 6, 11, 15. That part of the Hambrick tract lying within the locator's part, now in the possession of Thomas Blair, who holds title under Thomas Fitzgerald by deed in 1832. Tilton and Huston were contractors with Robert Pogue for this, and the residue of the Hambrick tract they sold to Hambrick, and he afterwards to Fitzgerald, who obtained a conveyance from Pogue about the year 1829. Statement of Thomas Blair. This part of the Hambrick tract contains 15 acres, 1 rood, and 7 poles, by survey."

No. 2. "11, 30, 31, 32, 11. The balance of the Hambrick tract in the possession of said Blair outside of the locator, said to contain 30 acres covered in common by Walden's two surveys."

No. 3. "4, 12, 13, 14, 4. Represents 14 acres, 3 roods, and 8 poles, within the locator, in the possession of said Blair, held by purchase from Robert Pogue, who held under Lewis Chapin. No title or conveyance has yet passed. Statement of said Blair. This tract has never had a regular tenant upon it. Statement of Jos. Duncan."

This return stands undisputed, and from it the answer of Blair may be explained. No. 2 (11, 30, 31, 32, 11) is that parcel of 30 acres lying outside of the land recovered by the ejectment, and with which we have no power to interfere, as already stated, being lot C on the annexed plat.

No. 3 (4, 12, 13, 14, 4), including 14 acres, 3 roods, and 8 poles, is the land derived through Lewis Chapin by Robert Pogue; and this tract is not in controversy now.

But No. 1, marked B, for 15 acres, 1 rood, and 7 poles, is land of which Pogue obtained possession from Abram Shockey; and Pogue was a principal party to the bill of injunction staying the judgment at law. In the ejectment, this latter parcel B was recovered against Shockey; and when *51] the demise was *extended, in 1824, the judgment was in full force against him, and those holding the possession under him. Thus the matter stood when Blair purchased and took possession in 1833. From this time upwards to 1839, Blair was subject to be evicted by a writ of possession, to which Walden, or his heirs, had an undoubted right; and to lands thus situate the mandate of this court extends, for the reasons already stated, in regard to the parcel marked A, and defended by Proctor and Kincaid. It is therefore ordered,

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that Walden's heirs be put into possession of the parcel marked B, for 15 acres, 1 rood, and 7 poles; and that the decree of the Circuit Court in regard thereto be reversed.

And as respects all other parts of the decrees and orders made by the Circuit Court, in execution of our mandate, we hold the same to have been proper, in so far as such decrees and orders awarded possession to Walden's heirs, or rejected their claim to have possession; and said decrees and orders are hereby affirmed, with the modification hereafter stated, as respects the putting of Walden's heirs into immediate possession; and also as respects the mode of proceeding to recover rents and profits, or for value of improvements.

And it is further ordered, that this cause be remanded to the Circuit Court, with directions that Walden's heirs and representatives be put into the possession of all the parcels of land awarded to them under the mandate, either by the Circuit Court or by this court, on or before the 1st of January next; and it is further ordered, that such possession shall be delivered to Walden's heirs or representatives, regardless of the fact whether claims for improvements or for mesne profits exist on the one side or the other; the intention of this court being to give possession to Walden's heirs and representatives in the same manner that a writ of *habere facias possessionem* would do when executed, so that they may have the benefit and advantages of their judgment at law.

And it is further ordered, that any party on whom this decree operates, who claims compensation for improvements made on the land, or on any parcel thereof, may file his petition before said Circuit Court, setting forth his claim to compensation for such improvements; and that said heirs or representatives of Walden may answer the same, and be allowed to set off mesne profits arising because of the possession of the parcel of land on which said improvements are alleged to have been made; and that, in deciding on such controversy, said Circuit Court shall be governed by the rules appertaining to a court of equity in such like cases.

*And it is further ordered, that the heirs and representatives of Walden shall have the corresponding [*52 right to file their petition against any claimant holding possession, and who has been a party to this proceeding, or who may hold under such party by transfer of title made since the date of the mandate of this court, for any rents and profits that can be equitably claimed for the occupancy and use of said respective parcels of land; and to adjudge and decree among the respective parties as equity may demand. Nor shall cross petitions for value of improvements, and for

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mesne profits on the other hand, be required; but the court may hear the whole matter on petition and answer, and decree for either side for any balance, after one demand is set off, in part, against the other, on an account stated.

And it is further ordered, that the appeal brought here by said Walden's heirs, to reverse the decree dismissing the cross-bill filed, 25th November, 1834, by Ambrose Walden, and the amendments and other proceedings in said cross-bill, and which are found in record No. 96 of this court, be dismissed; and that the decree of the Circuit Court dismissing the same be, and the same is hereby, affirmed; and that the appellants, the heirs of Walden, pay the costs of said appeal.

And it is further ordered, that the appellees, John N. Proctor and Thomas Blair, against whom decrees for lots A and B have been made, and who are the principal appellees, pay the costs of the appeal on record No. 95 of this court, containing the proceedings had before the Circuit Court when executing our mandate of 1840, and that said Proctor and Blair pay said costs by moieties; that is, one half thereof each.

And as respects the parcel marked D on the plat accompanying this decree, being for forty-nine acres and twenty-eight poles, defended by Benjamin Umstead in the Circuit Court, and which said court adjudged should be surrendered to Walden's heirs, it is ordered and decreed, that said parcel be delivered to Walden's heirs by said Umstead on or before the 1st of January next. And that in other respects said decree against Umstead be affirmed, except that in proceeding for improvements he shall be governed by the rules that other defendants are.

And as respects the parcel of fourteen acres, two roods, and thirty-six poles, represented to be in the possession of the widow of William Craig, and designated on the plat by the figures 21, 3, 22, and 21, it is ordered and adjudged that all further proceeding under the mandate shall be barred, and no further steps be allowed as to said parcel, because said *53] widow *of William Craig has in no wise been made a party to the proceeding, and it is now too late to bring her before the court.

And as respects the parcel marked E on the plat, containing nineteen acres, three roods, and twenty-eight poles, designated by the figures 15, 16, 17, 18, 19, 20, and 15, defended by John N. Proctor, and which was adjudged by the Circuit Court to be by him surrendered to Walden's heirs, it is ordered that said parcel shall be surrendered accordingly on or before the first day of January next, and that in this re-

spect said decree is deemed to be conclusive against Jeremiah Wells and all others claiming under Proctor ; and that, therefore, so much of said decree as leaves the controversy open to let in Jeremiah Wells further to litigate be, and the same is hereby, reversed. Reserving, however, to said Wells the right to come forward, if he has any interest or claim for the value of improvements, in the same manner that said Proctor might do, according to the principles and in the mode above prescribed. This decree is founded on the fact that Proctor appears to be the owner, and he defended before the Circuit Court ; and nothing appears in the record to show that Wells has any claim to the land, nor that he had been in possession for such length of time as to bar Walden's right to demand possession from him.

And as respects the parcel F on the plat, of fourteen acres, three roods, and eight poles, designated by the figures 4, 12, 13, 14, 4, defended by Thomas Blair, and which the Circuit Court ordered him to surrender to Walden's heirs, it is ordered and decreed that said parcel be surrendered to the heirs of Walden on or before the 1st of January next ; and that so much of said decree as allows said Blair to retain possession until the value of improvements, &c., be taken, be, and the same is hereby, reversed. But that said Blair shall be allowed to file his petition, and to seek payment for his improvements, on the general principles above stated. And on petitions being filed for the value of improvements, service of notice on the counsel of Walden's heirs shall be sufficient service.

And as to all matters respecting the payment of costs, not disposed of in the Circuit Court, it is ordered that said court proceed to take cognizance thereof, and make decrees and orders therein.

ORDER. No. 96.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Kentucky, and was argued by counsel. On consideration whereof, it seems to this court that there is no error in *the decree of the said Circuit Court, dismissing the cross-bill filed 25th November, 1834, by Ambrose Walden, and the amendments and other proceedings on said cross-bill. Whereupon, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

ORDER. No. 95.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Kentucky, and was argued by counsel. On consideration whereof, it appears to this court that that part of the decree of the said Circuit Court, in the case between Thomas Bodley's heirs, Robert Pogue's heirs, and others, complainants, and Ambrose Walden's heirs, defendants, on a mandate from this court that the heirs of Ambrose Walden were not entitled to obtain, in the proceeding against John N. Proctor, the possession of the parcel of land designated on the plat of the survey by the letters and figures 1, a, b, 4, 5, 6, 11, and 1, is erroneous and should be reversed; and also, that that part of said decree, that the said heirs of Walden were not entitled to obtain in the proceeding against Thomas Blair the possession of the parcel of land in his possession, designated in the report of the surveyor by the figures 15, 14, 5, 6, 11, and 15, containing fifteen acres, one rood, and seven poles, is erroneous, and should be reversed; and that the residue of the said decree should be affirmed, with the modifications stated in the opinion of this court, in this case at this term. Whereupon, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause, for the errors aforesaid, and to the extent thereof, be, and the same is hereby, reversed and annulled; that the heirs of Ambrose Walden recover a moiety, or one half, of their costs, on this appeal in this court, of and from the said John N. Proctor, and the other moiety, or half, of and from the said Thomas Blair, and that they have executions against them severally therefor; and that this cause be, and the same is hereby, remanded to the said Circuit Court, with directions to that court to carry into effect the opinion of this Court (hereto annexed, and made part of this mandate), and for such further proceedings to be had herein as may be in conformity to this opinion, and as to law and justice may appertain.

***WILLIAM WHEELER, APPELLANT, v. HUGH SMITH AND PHINEAS JANNEY, EXECUTORS OF CHARLES BENNETT, DECEASED, AND SURVIVING TRUSTEES UNDER HIS WILL, AND MOLLY E. TAYLOR, EXECUTRIX, AND HENRY DAINGERFIELD AND PHINEAS JANNEY, EXECUTORS OF ROBERT TAYLOR, DECEASED, WHO WAS AN EXECUTOR AND TRUSTEE UNDER THE SAME WILL, HUGH C. SMITH, EXECUTOR OF THE SAME CHARLES BENNETT, AND THE COMMON COUNCIL OF ALEXANDRIA, DEFENDANTS.** [*55]

The statute of the 43d Elizabeth, respecting charitable uses, having been repealed in Virginia, the courts of chancery have no jurisdiction to decree charities where the objects are indefinite and uncertain.

Therefore, where a bequest was made to trustees for such purposes as they considered might promise to be most beneficial to the town and trade of Alexandria such bequest was void.¹

¹ DISTINGUISHED. *Fountain v. Ravenel*, 17 How., 384. FOLLOWED. *Kain v. Gibboney*, 11 Otto, 367. CITED. *Hathaway v. New Baltimore*, 48 Mich., 264.

In Illinois it is held that the purposes of the American Bible Society are not within the statute of charitable uses of 43 Eliz., ch. 4. When a devise of land to that society fails for want of corporate power to take, the court cannot order the land sold and the proceeds applied to the uses of the society, on the doctrine of *cy pres*; but the land descends as undivided. *Starkweather v. American Bible Society*, 72 Ill., 50.

In Maryland, if either the object of a legacy, or the person of the legatee, or *cestui que trust*, be so uncertain, that no one can show a title to claim the legacy, or to enforce the execution of the trust, it is void, even in the case of an executory devise. *Barnes v. Barnes*, 3 Cranch, C. C., 269.

In Pennsylvania, such bequests are not void because of the uncertainty of the beneficiaries. *Vidal v. Girard's Exec.*, 2 How., 127; *Magill v. Brown*, Bright. (Pa.), 346. So also in Ohio, *Perin v. Cary*, 24 How., 465. Thus, a devise of land, "in trust for the formation and support of a home for aged, infirm, or invalid gentlemen and merchants, where they may enjoy the comforts of an asylum, not eleemosy-

nary, but as far as may be, by the addition of their own means, an honorable home" is valid. *Cresson v. Cresson*, 6 Am. L. R., 42.

The following bequest, "I leave the whole of said funds in the hands of my executor, to be by him applied to the support of missionaries in India, as it is my desire to aid, &c., the same to be applied under the direction of the General Assembly's Board of Missions of the Presbyterian Church in the United States," is void for uncertainty. *Board of Foreign Missions v. McMaster*, 4 Am. L. R., 526.

A bequest in trust to a religious corporation, of a sum of money for the poor of certain towns named in the will, to be used and expended by the trustees in their "discretion for the best interest of the poor persons who at the time of my [the testator's] decease, and thereafter may reside in said towns or either of them, it being my desire that this bequest be used for the relief of the most needy and indigent poor people residing in said towns, or either of them now or hereafter, until said bequest be in such manner expended."—*Held*, void for uncertainty as to the *cestuis que trust*. *Matter of Abbott*, 3 Redf. (N. Y.), 303.

A bequest to an unincorporated association or society is void—there can be no valid trust without a certain

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Where the heir at law, who was young, needy, and hurried, executed a release, in consideration of a sum of money, to the executors, who were men of high character, and who assured the heir that the bequest was considered to be good, such release was held to be invalid.²

donee or beneficiary.—*First Presbyterian Soc. of Chili v. Bowen*, 21 Hun (N. Y.), 389.

A testator having disposed of two-thirds of his estate, then provided in his will as follows: "The balance I give to my executors, to be divided by them amongst such Roman Catholic charities, institutions, schools or churches in the city of New York, as a majority of my executrix and executors shall decide, and in such proportions as they may think proper." At the time of testator's death there were numerous incorporated Roman Catholic charities, institutions, schools and churches in the city of New York, authorized to take by devise or bequest. Held, that it should be presumed that the testator intended to confine his bequest to such charities as were incorporated and authorized to take by will, and that the trust was not invalid by reason of the uncertainty of the beneficiaries. *Power v. Cassidy*, 16 Hun (N. Y.), 294; *affirmed* 79 N. Y., 602.

Where a devise is made to a charitable incorporation, authorized to take it, in trust for an association, then unincorporated, it is sufficient if the latter be incorporated before the money becomes payable, although it was an unincorporated voluntary association only, at the time of the testator's death. *Philson v. Moore*, 23 Hun (N. Y.), 152.

"The opinion prevailed extensively in this country for a considerable period, that the validity of charitable endowments and the jurisdiction of courts of equity in such cases depended upon the Stat. 43 Eliz., ch. 4. By more recent discussions this idea has been exploded. [Bright. (Pa.), 346; 7 Ib., 241; 2 How., 128.] One cannot feel but surprised, on reading the statute carefully, that the doubts thus indicated ever existed. The statute is purely remedial and ancillary. It provides for a commission to examine into the abuses of charities already existing, and to correct such abuses. An appeal lay to the lord chancellor. The statute was

silent as to the creation or inhibition of any new charity, and it neither increased or diminished the pre-existing jurisdiction in equity touching the subject. The object of the statute was to create a cheaper and speedier remedy for existing abuses. In the course of time the new remedy fell into disuse, and the control of the chancellor again became, practically, sole and exclusive. The learning developed in the three cases mentioned shows clearly that the law as to such uses, and the jurisdiction of the chancellor, and the extent to which it was exercised, before and after the enactment of the statute, were just the same." *Ould v. Washington Hospital*, 5 Otto, 303. S. P. *Griffith v. State*, 2 Del., Ch. 421; *State v. Griffith*, Id., 392; *Comm'rs of Lagrange County v. Rogers*, 65 Ind., 297.

² APPLIED. *Snell v. Insurance Co.*, 8 Otto, 92. S. P. *Hallett v. Collins*, 10 How., 174.

A court of equity will relieve a party acting under a misapprehension that he has no title to property, from the legal effect of instruments which surrender such unsuspected title. *Morgan v. Dod*, 3 Col., 551. And it has original jurisdiction to set aside the satisfaction of an execution, on the ground of mistake of fact as to the state of defendant's title to the land levied upon. *Swaggerty v. Neilson*, 8 Baxt. (Tenn.), 32. So, it will not enforce, where no consideration has passed, the execution of a release given by a layman, in plain ignorance of the law, when dealing with a lawyer, and led by him to do the very opposite to what he at the time expresses his intention to do; and this, although no false statement be made. *Mellon v. Webster*, 5 Mo. App., 449.

Equity will relieve the wards of the consequence of a mistake of law, by the guardian, who includes in a conveyance an interest of the wards, of which both he and the grantee were ignorant. *Baker v. Massey*, 50 Iowa, 390. But it is not a matter of course for equity to interfere to correct the error, where by reason of mistake in

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THIS was an appeal from the Circuit Court of the United States for the District of Columbia and County of Alexandria.

It was a bill filed by Wheeler under the following circumstances. He was the nephew of Charles Bennett, who died in 1839, leaving neither father nor mother nor brothers nor sisters, nor any descendant of any brother or sister except Wheeler, who, as above stated, was his nephew. Previous to 1839, he had been assisted by his uncle, but had fallen into bad and extravagant habits, and removed to the State of Pennsylvania. Bennett had placed some land and \$20,000 in the hands of two trustees for Wheeler's benefit.

In this state of things Bennett died, leaving a will from which the following are extracts, viz:—

"15th. To Francis E. Rozer and John M. Lisle I leave the direction of all relating to William Wheeler. I have vested with the latter the funds intended for his use, in consequence of being obliged to take possession of his estate and blend it with my own; he is at liberty, and is enjoined, whenever he considers said William may be safely trusted, to give him possession of all left for his use. The landed estate I wish preserved if it can be; it stands deeded in the name of

computing interest, a discharge of a mortgage is given on payment of less than the actual debt. *Wright v. Garrison*, 40 Mich., 50. It will relieve against an unfair division of joint property, which is the result of an innocent mistake. *Boone v. Ridgway*, 2 Stew. (N. J.), 543. *S. P. Pool v. Docker*, 92 Ill., 501.

A mere mistake of law does not, in the absence of other circumstances, constitute any ground for the reformation of a written contract. *Snell v. Atlantic Ins. Co.*, 8 Otto, 85.

A mistake as to a matter of fact, to warrant relief in equity, must be material, and the fact must be such that it animated and controlled the conduct of the party. It must go to the essence of the object in view, and not be merely incidental. The court must be satisfied, that but for the mistake the complainant would not have assumed the obligation from which he seeks to be relieved. *Kerr*, Mistake and Fr., 408; *Tregg v. Read*, 5 Humph. (Tenn.), 529; *Jennings v. Broughton*, 17 Beav., 541; *Thompson v. Jackson*, 3 Rand. (Va.), 507; *Harrod's Heirs v. Cowan*, Hard. (Ky.), 543; *Hill v. Bush*,

19 Barb. (N. Y.), 522; *Jouzan v. Toulmin*, 9 Ala., 662.

A release made by a legatee to his testator and the remaining legatees, of all his interest in the estate, in consideration of a sum of money paid him by the testator, is without consideration and void. *Allen v. Allen*, 13 So. Car., 512; s. c., 36 Am. Rep., 716.

Where one who was injured by the negligence of a railroad company released his cause of action against the company at a time when, by reason of the action of opiates taken to relieve his pain, he was mentally incapacitated to contract, the release was set aside. *Chicago & c. R. R. Co. v. Doyle*, 18 Kan., 58. Compare *Pennsylvania R. R. Co. v. Shay*, 82 Pa. St., 198; *Eagle Packet Co. v. Defries*, 94 Ill., 598. So where the widow of a mortgagor, induced by the mortgagee's fraudulent representations that she had no interest in the mortgaged premises, sold to him for \$200 what was worth \$2000. Held, that though her mistake was one of law, she should be relieved. *Bales v. Hunt*, 77 Ind., 355.

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Francis E. Rozer and John M. Lisle, and is under the management of John I. Jenkins, in Charles County, Maryland. Having come through William's family two hundred years ago, I should regret its not continuing."

"20th. The residue of my estate is left in trust of Hugh Smith, Robert I. Taylor, and Phineas Janney, for such purposes as they consider promises to be most beneficial to the *56] *town and trade of Alexandria; if any difficulty occurs in construction as to any of my bequests, R. I. Taylor is specially charged to give said construction."

Then followed several papers in the nature of codicils, one of which was as follows :

"Now in the inclosure I leave the residue of my estate, after paying all bequests and appropriations, to some disposition thereof which my executors may consider as promising most to benefit the town and trade of Alexandria. Now I leave the same entirely to their disposition of it, in such manner as appears to them promises to yield the greatest good.

"CHARLES BENNETT. [SEAL.]"

The will, with seven codicils, was admitted to probate on the 4th of May, 1839, and letters testamentary granted to Hugh Smith, Robert I. Taylor, and Phineas Janney, named as executors in the will. At the same time were filed the following release and receipt :—

"Whereas, Charles Bennett, Esq., late of Alexandria, deceased, by his last will and testament, after bequeathing sundry pecuniary legacies, devised as follows :—'The residue of my estate is left in trust of Hugh Smith, Robert I. Taylor, and Phineas Janney, for such purposes as they consider promise to be most beneficial to the town and trade of Alexandria; if any difficulty occurs in construing as to any of my bequests, R. I. Taylor is specially charged to give the said construction'; and in a codicil to his said will expresses himself as follows :—'Now, in the inclosure, I leave the residue of my estate, after paying all my bequests and appropriations, to some disposition thereof which my executors may consider as promising most to benefit the town and trade of Alexandria. Now I leave the same entirely to their disposition of it, in such manner as appears to them promises to yield the greatest good.' And whereas the validity of the said devise and bequest has been controverted by William Wheeler, now of Chester County, in the State of Pennsylvania, claiming to be the nephew and sole heir of the said Charles Bennett. Now

the said executors, taking on themselves the burden of the execution of the said will, and of the trusts aforesaid, and the said William Wheeler, to avoid the delay and expense of litigation, and finally to settle and adjust all doubts and difficulties which might arise on the effect of the said will, so as to leave the said executors to execute the same without delay or impediment, have agreed on the following terms of compromise.

*"1st. That the said executors shall, within one year from the date hereof, at all events, or sooner if [*57 funds in cash remain in their hands, after the payments of the money legacies bequeathed by the said will, pay to the said William Wheeler, or his order, the sum of twenty-five thousand dollars. 2dly. That they shall release to the said William Wheeler all claims, if any they have, to any property, real or personal, heretofore conveyed or settled in any way by the said Charles Bennett, in his lifetime, for the use of the said William Wheeler. 3dly. That the said William Wheeler, on his part, shall release to the said executors all his claims, in law or equity, to the estate, real and personal, devised and bequeathed, or intended to be devised or bequeathed, by the said Charles Bennett, by his said will, to be held and disposed of by the said executors in the manner in and by the said will prescribed. And that the said executors shall be at liberty, if any specification of the objects to which the residuary fund is to be applied be thought necessary, to apply the same to aid in finishing the Alexandria Canal, either by a direct subscription to its stock, or by purchasing in the stock of the Alexandria Corporation issued or to be issued in payment of the subscription of the said corporation to the said canal; to the extinguishment of the debt of the Corporation of Alexandria; to introduce into the town, for the use of the inhabitants, a supply of pure and wholesome water; and to subscribe to any railroad or other roads communicating with the said town; to any or to all of the above purposes in such way as the said executors or the survivors may think most conducive to the prosperity and welfare of the town. Now, therefore, the said executors do hereby covenant with the said William Wheeler, that they will, within twelve months from the date hereof, or sooner if cash funds remain after paying the pecuniary legacies, pay to him or his assigns the sum of twenty-five thousand dollars. And the said executors do hereby for ever release to the said William Wheeler, his heirs and assigns, all claims and demands they have or may have hereafter under the said will to any estate, real and personal, heretofore given, settled, or conveyed by the said

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Charles Bennett, in his lifetime, to the said William Wheeler, or to any person or persons in trust for him, and more especially to twenty thousand dollars stock of the State of Pennsylvania, standing in the name of John Lisle and John K. Mitchell, for the use of the said William; and they do, moreover, covenant to execute and deliver all further deeds or other instruments necessary to carry into effect this arrangement. And the said William Wheeler does on his part hereby for ever release to the said executors all his right, title, claim, *58] *and demand in and to all the estate, real and personal, devised or intended to be devised by the said Charles Bennett, by his said will, for the purposes expressed in his will, with power to the said executors to appropriate the residuary fund as before specified, if any particular designation of the purposes be necessary. And the said William Wheeler, for himself and his heirs, does hereby covenant with the said executors and their representatives to execute and deliver all such further deeds of conveyance and release as may be found necessary more fully to carry into full effect this agreement.

"In witness whereof, the parties to this instrument have hereto set their hands and seals, this 4th day of May, 1839.

| | |
|-----------------|---------|
| " WM. WHEELER. | [SEAL.] |
| HUGH SMITH. | [SEAL.] |
| R. I. TAYLOR. | [SEAL.] |
| PHINEAS JANNEY. | [SEAL.] |

"Sealed and delivered in presence of

ROBERT. H. MILLER,
WM. H. FOOTE,
JAS. MILLAN."

"Received from Hugh Smith, Robert I. Taylor, and Phineas Janney, executors of Charles Bennett, deceased, five thousand dollars, in part payment of the sum covenanted to be paid by the above agreement. May 4th, 1839.

" [\$5,000.]

WM. WHEELER."

The circumstances under which the above release was executed are thus stated in the bill of the complainant, Wheeler:—

"At the time of his uncle's death, in April, 1839, your orator resided, as he does at present, in Chester County in Pennsylvania, in very cramped and straitened circumstances. It is true that the income settled upon him by his uncle was sufficient, with proper economy, to afford him a comfortable and independent subsistence. But he found it difficult, nay, im-

practicable, to divest himself entirely of those expensive habits which he had formed while he was presumptive heir and expectant of great wealth; for Mr. Bennett's wealth, as is usual in such cases, was considerably overrated.

"Whatever was the cause of his embarrassments, however, the fact was as he has stated, and is susceptible of the most ample proof. Whether the fact of his necessitous condition had come to the knowledge of his uncle's executors, through Mr. James R. Riddle, of Alexandria, with whom your orator kept up a correspondence, he does not know. He thinks it more than *probable; and he charges such knowledge, so far as it is necessary to make such charge, in order [*59 to let in evidence of the fact.

"Such was his situation when, about the end of April, 1839, he received a letter from Mr. Riddle, written at the instance of the executors, informing him that his uncle had died on the 24th of that month, that his will would be offered for probate in the Orphans' Court of Alexandria on the 4th of May, and that the presence of your orator on that occasion, as next of kin and heir at law of the decedent, was desirable, or was necessary. He received by the same mail the Alexandria Gazette, in which it was stated that Mr. Bennett, having made provision for his immediate relations in his lifetime, had left a will, by which, after giving a number of legacies to his friends, &c., he had devised the residue of his property to the town of Alexandria. The letter of Mr. Riddle is lost or destroyed, and your orator cannot recollect its precise date, or the precise day on which it was received; but he well recollects that the notice given to him was very short, and that the difficulty of reaching Alexandria, on so short a notice, was enhanced by his moneyless condition, and the necessity of borrowing \$50 to defray the expenses of the journey. With all the exertion he could make, it was noon on the 2d of May before he arrived at Alexandria.

"He quickly communicated to Mr. Riddle, who handed to him on his arrival a copy of his uncle's will, his determination to contest the validity of the residuary devise. In an interview which he had, on the same afternoon, with Hugh Smith, Esq., one of the executors, that determination, which had been communicated to Mr. Smith by Mr. Riddle, was the subject of conversation. At that interview Mr. Smith manifested a kindly feeling towards your orator, and appeared to be almost nervously anxious that a lawsuit should be avoided. He did not, however, express any fears about the result. On the contrary, he stated that the executors had

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consulted counsel, whose opinion was in favor of the validity of the whole will, and seemed to have entire confidence in the correctness of the opinion. But he intimated, delicately, that the executors entertained a friendly feeling for your orator, and were disposed to act liberally with him; and admitted that they greatly deprecated the delay which would attend a litigation. He spoke much and earnestly about the inevitable delay and vexation of a suit. He said that a smart and ingenious lawyer could pick a hole in almost any instrument of writing. That no doubt such an one could be *60] found who would undertake your orator's case, and then the will would be thrown into chancery, where it would remain for years. Your orator remarked that, at that time, he was not able to fee a lawyer, but that he could obtain assistance from his friends. Mr. Smith proceeded to say, that he thought a course might be taken by which expense and delay might both be avoided. He suggested, in short, that the executors were willing to pay a sum of money to your orator for a release of all claims on the estate, and proposed a conference between your orator and all three of the executors on the forenoon of Friday, the 3d of May, at the late residence of Mr. Bennett, which was accordingly appointed to take place.

"The amount which the executors were disposed to give for a release was not specified at the preliminary interview; but your orator learned, from a credible source, after the release had been executed, and the will had been admitted to probate, that the executors had at that time, and before the arrival of your orator, determined to offer him ten thousand dollars, and no more. He also learned from the same source, and at the same time, that the executors (or some one or more of them, your orator cannot recollect which) had called upon him (your orator's informant) before your orator's arrival, to learn his character; and that (he or) they seemed to be impressed with the belief that your orator was of an easy disposition, and not over smart or intelligent, and that he would gladly accept their offers at once. Your orator's informant added, that to undeceive them he read to them parts of your orator's correspondence with him.

"At the conference of May 3d, at which were present the three executors, Mr. Riddle, and your orator, and no other person, your orator very briefly stated, in substance, that his opinion or impression was that the residuary devise in the will was void, and that he had determined to test its validity by legal proceedings. On the part of the executors, Mr. Taylor was the principal and almost the only spokesman.

"He insisted much on sundry written opinions of counsel in favor of the legal validity of the residuary devise, which he offered to show your orator. He conveyed to your orator's mind (but by what language or phrases he cannot recollect) the clear and distinct impression, that there was but one opinion among the lawyers consulted on this question, or, in other words, that they were unanimous in favor of the legal validity of the residuary devise. But as Mr. Taylor had not stated that he concurred in opinion with the counsel whom the executors had consulted, and as your orator regarded him as counsel of *the highest legal ability, [*61 he (your orator) asked him, without ceremony, what his opinion was on the subject.

"His reply was, that your orator ought not to have asked his opinion; but as he had been asked, he would give it. The substance and effect of his opinion was, that the devise in question was a legal and valid disposition of the residue of the estate. When your orator, now greatly disheartened, intimated deferentially that he had taken up a contrary opinion, Mr. Taylor said that he admitted that in Pennsylvania such a devise would not be good; but that it was good under the old law of Virginia, as it existed at the time of the cession of the County of Alexandria by Virginia, which law was the law of the County of Alexandria up to the time of Mr. Bennett's death.

"But while an undoubting confidence was expressed by the executors, through Mr. Taylor, in the ultimate result of any litigation about the validity of the residuary devise, they admitted, and accounted for their anxiety to obtain an immediate release of your orator's claim, by insisting on the great importance to the town of Alexandria of an *immediate* application of the residuary fund to the completion of the canal, more especially, and to other useful and important objects. To avoid the delay of a lawsuit, they were willing to pay for a release of your orator's claim, however untenable and desperate. Your orator does not mean here to quote the language of Mr. Taylor, but to state the impression made on his mind by the language used.

"It were tedious to tell much more that was said at this conference. Suffice it to say, that Mr. Taylor was a man of commanding intellect; and that, under the most favorable circumstances, your orator would have been wholly unequal to the intellectual conflict in which he found himself involved with one so gifted, and for whom he entertained an habitual and profound respect. But having no distinct or settled views of the legal question thus suddenly forced upon him,

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or time to form any, fevered by a rapid journey, his spirits depressed by the recent death of his last kinsman, to whom he had been tenderly attached, and flurried and confused by the magnitude of the question he was called on to decide, and the necessity of deciding it at once, your orator felt himself wholly overpowered, and strongly inclined to succumb to the views so forcibly presented to him. And these views were moreover recommended to his favorable consideration by the offer, so tempting to a man in his situation, of a large sum of money, without delay or further trouble.

"In this state of mental ferment, your orator scarcely
*62] *knowing what to do or say next, asked the executors what sum they proposed to give him for a release. They answered that it was for him to say what he would be willing to take; and the conference closed with a request on the part of the executors, that your orator would consider the matter, and let them know his decision in the course of the day.

"But how could he, in the time allowed him, give to the subject the consideration its importance deserved, or any consideration? His personal incompetency to decide the question, or even to consider the subject in so short a time, he has already stated truly, and without exaggeration. He was so much flurried that his mind could not act. Why not, then, resort to learned and able counsel, having no personal interest in the question, for advice and direction? The answer is, that the executors, by the shortness of the notice which they had given him, or, in other words, by appointing so early a day for the probate, had effectually precluded him from pursuing this obvious and only rational course. A brief reference to the facts of the case will show conclusively the correctness of this assertion.

"It was now past noon on the 3d of May, and your orator was given to understand that on the next day the will would and must be offered for probate. Counsel was, in the mean time, to be sought for in Alexandria, where the whole population was interested in sustaining the will, and where, without derogating from the professional merit of the rest of the bar, it may be said that the first jurist of the town was committed against him. And if it be conceded that good counsel could have been had in Alexandria, it is still perfectly obvious that he could not have had time to examine and give an advised opinion on a question involving above one hundred thousand dollars; and, if not one of great difficulty, still one requiring a very great and deliberate consideration. No counsel would have taken on himself the responsibility of

giving a final opinion on such a subject in the time that was allowed to your orator for his decision. He was therefore compelled to decide, without the aid of counsel, whether he would make the legal validity or the legal invalidity of the devise the basis of his action ; and being entirely in the dark, he concluded that the only safe course was to consider the devise valid, and take what he could get for a release. But he was required to name a sum, and *what* sum he should name and demand was the remaining question.

"And here, again, such was the precipitation with which this important business was conducted, that he had no certain *premises on which to act ; for he had neglected to ask the executors, and they had not informed him, what [*63 would probably be the amount, after deducting legacies and expenses of administration, of the residuary interest which he was asked to surrender ; so that, while he was apparently offered an election whether to go for the whole, or to take some definite amount in lieu of his chance of getting the whole, it was an election between a known quantity and an unknown quantity. That is to say, it was no election at all, but a mere proposition that he should guess what sum he would be content to receive, or at what point he ought to take his stand, and refuse to fall lower in his demands. Under this duress of circumstances he made a guess, and informed the executors in the course of the day that he would release his claim for \$30,000. Their reply was an offer of \$20,000, an answer to which was required on the following morning, the day of probate. In the morning of the following day, your orator called on Mr. Smith, and told him that 'he would be better satisfied with \$25,000.' The executors agreed to give that sum, and so the matter ended.

"The agreement between your orator and the executors was forthwith committed to writing and executed, that is to say, signed and sealed by the parties. A certified copy is herewith presented, as a part of this bill."

The bill then proceeded to account for the delay in bringing the suit, and concluded in the usual form.

The bill was filed in May, 1844.

In January, 1845, the defendants demurred to the bill.

In October, 1846, the complainant filed an amended bill, making the Common Council of Alexandria a defendant. The Circuit Court, upon argument, sustained the demurrer, and dismissed the bill, from which decree an appeal brought the case up to this court.

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It was argued by *Mr. James M. Mason* and *Mr. Cooke*, for the appellant, and *Mr. Davis* and *Mr. Coze*, for the appellees.

Mr. Mason contended,—

1st. That the codicil which has been inserted in the statement was designed to revoke the 20th clause of the will, which clause mentioned the town and trade of Alexandria, whereas the codicil left it entirely discretionary with the trustees to apply the fund in any manner which promised to “yield the greatest good”; in which case no lawyer, who values his reputation, would venture to express the opinion that such a devise could be enforced by a court of chancery, either on the general principles of trusts, or under the law of charities, sup-
*64] posing *that law to have been in force in the County of Alexandria when the will took effect.

Conceding, however, hypothetically, that the codicil was but a senseless reiteration of the devise in the will, let us proceed to inquire into the validity of that devise.

And on this point, the appellant submits, in the first place, that the devise in the will (and *a multo fortiori*, the devise in the codicil) creates, or attempts to create, a trust which is void for uncertainty, and one which a court of chancery will not and cannot enforce, on the general or ordinary principles of trusts.

In support of this proposition, the following authorities are relied on.

2 Story, Eq., title *Trusts*, § 979, *a*; *Id.*, § 979, *b*; *Stubbs v. Sargon*, 2 Keen, 255; *Ommanney v. Butcher*, 1 Turn. & R., 260, 270, 271; 2 Story, Eq., §§ 1071, 1072, 1073, 1156, 1157, 1183, 1197, *a*; *Wood v. Cox*, 2 Myl. & C., 684; *s. c.*, 1 Keen, 317; *Fowler v. Garlike*, 1 Russ. & M., 232; *Gallego v. Attorney-General*, 3 Leigh (Va.), 450; *Morice v. Bishop of Durham*, 10 Ves., 542; *Attorney-General ex relat. of the Inhabitants of Clapham v. Hower*, 2 Vern., 387; *Parish of Great Creaton*, 1 Ch. Cas., 134.

But it is supposed that the appellees have little confidence in their first point, namely, that the devise in the will is sufficiently certain to be carried into effect by a court of equity acting on the general principles of trusts, and that, driven from that point, they will fall back on the position that the devise is valid under the doctrine of charities.

The appellant, on the other hand, will insist on the counter proposition, that neither of the devises (that in the will, or that in the codicil) is a charitable devise at all, according to the law of charities as it exists in England, and in some of the American States, and therefore cannot be aided as such.

Conceding (on the authority of *Vidal v. Girard's Executors*, 2 How., 127) that the Court of Chancery in England, before the statute of 43d Elizabeth, and consequently on common law principles, exercised the power of aiding vague and defective grants and devises, when made for charitable purposes, it will be shown by authority too strong to be shaken, that the Court of Chancery will not aid any vague or imperfect devise or grant, as a charity, unless it be one of those enumerated in the statute 43d Elizabeth, to the exclusion of all objects and purposes which are not enumerated, or come within the purview of the enumerated charities, or some one of them, or be for "charitable purposes *eo nomine*."

*These adjudications rest on the assumption that the enumeration of charities in the statute recites and com- [*65 prehends all the charities that existed, or were recognized, at common law. This is tantamount to the proposition, that no defective or vague devise will be aided, under the doctrine of charities, unless the property or fund granted or devised be exclusively limited and devoted to purposes charitable within the statute. That if any other purpose be mentioned, or deducible by inference along with the charitable purpose, or if the devise be in such terms that the property or fund may be applied to any purpose not within the statute, the court will not aid it. And it will be seen that these doctrines are fatal to the devise made by Charles Bennett's will; because it does not appropriate the trust fund exclusively to the purposes enumerated in the statute, or to purposes within the purview of those enumerated, but is broad and comprehensive enough to authorize the trustees to employ the fund in many ways without the scope of the statute.

The authorities which are relied on to sustain this position are as follows.

2 Story, Eq., § 1160, containing an enumeration of the charitable uses recognized by the statute; *Id.*, § 1155; 2 Roper on Leg., by White, c. 19, § 1, pp. 111, 112; *Morice v. Bishop of Durham*, 9 Ves., 399; s. c., 10 Ves., 522; *Brown v. Yeall*, 7 Ves., 50, n. (a); *Moggridge v. Thackwell*, 7 Ves., 36; *Attorney-General v. Bowyer*, 3 Ves., 714, 726; *Coze v. Bassett*, 3 Ves., 155; 2 Story, Eq., §§ 1156, 1157; *Ommanney v. Butcher*, 1 Turn. & Russ., 260, 270, 2 Roper on Leg., by White, c. 19, § 6, pp. 215, 222; *Vesey v. Jamson*, 1 Sim. & S., 69; *Williams v. Kershaw*, cited in 1 Keen, 232; *Ellis v. Selby*, 1 Myl. & C., 286, 298, 299; also *James v. Allen*, 3 Meriv., 17, cited in *Ellis v. Selby*; 2 Story, Eq., §§ 1158, 1183; *Trustees of Baptist Association v. Hart's Executors*, 4 Wheat., 1, 33, 39, 43, 44, 45;

Stubbs v. Sargon, 2 Keen, 255; *Fowler v. Garlike*, 1 Russ. & M., 232.

It will be insisted, as was said before, that under these authorities the devise in Charles Bennett's will is not a charitable devise, under the doctrine of charities; as it exists in England, and some of the States of the Union.

But suppose that these views are erroneous, or concede, for the sake of the argument, that this vague and uncertain devise is such an one as would be aided and enforced in England as a charitable devise, and under the doctrine of charities, whether of common law or statutory birth, the appellees *66] must go a step further, and show that the doctrine of charities was the law of the County of Alexandria when the will took effect. This is utterly and confidently denied.

When the County of Alexandria was separated from Virginia, an act of Congress was passed (February 27, 1801), entitled, "An act concerning the District of Columbia," by the first section of which it was enacted, "that the laws of the State of Virginia, as they now exist, shall be and continue in force in that part of the District of Columbia which was ceded by the said State to the United States."

The question, then, is, What was the law of Virginia on this subject, on the 27th of February, 1801? The answer is:—

1. That the statute of 43d Elizabeth was repealed on the 27th December, 1792. 1 Revised Code, 136.

2. That the Court of Appeals of Virginia, has decided, that, according to the true intent and meaning, force and effect, of the repealing statute, it repealed not only the statute of 43d Elizabeth, but the whole doctrine of charities, the common law having been merged in the statute. In *Gallego's Executors v. The Attorney-General*, 3 Leigh, 450, it was well said by the president of the court, speaking for the whole court, "that a due sense of the infinite difficulty and embarrassment which must attend the search after the common law doctrines anterior to the statute of Elizabeth, and a just view of the danger of reviving those obsolete doctrines, must determine us to leave the subject to the wisdom of the legislature itself."

By this decision, whether founded on good or bad reasons, it is established that, since the 27th December, 1792, it is the law of Virginia, and consequently the law of the County of Alexandria, that the courts of chancery cannot aid vague and defective grants or devises, even though they be for charitable purposes.

Vidal v. Girard's Executors, 2 How., 127, does not touch

the question before this court, which is, What was the law of Virginia on the 27th of February, 1801? That was a question as to what was the law of Pennsylvania. And it was decided that, in Pennsylvania, a corporation capable of taking and having corporate powers over the subject of education could lawfully take and apply a bequest for the erection of a great free school, the pupils to be white males, between six and ten years old, &c., &c. In page 192, Judge Story says,—“There are two circumstances which materially distinguish that case [*Baptist Assoc. v. Hart's Ex'rs*] from the one now before the court. The first is, that it arose under the law of Virginia, in which *the statute of 43d Elizabeth has been expressly and entirely abolished by the legislature,” &c. And in [*67 the same page (192) he says, that it has been decided by the Supreme Court of Pennsylvania, “that the conservative principles of the statute of Elizabeth have ever been in force in Pennsylvania, by common usage and constitutional recognition.” And again he says (p. 197),—“The case, then, according to our judgment, is completely closed in by the principles and authorities already mentioned, and is that of a valid charity in Pennsylvania.”

Mr. Mason then referred to the following acts and cases:—

An act for establishing religious freedom. Laws of Va., 1 Rev. Code, 1819, p. 77.

An act concerning glebe lands and churches in this commonwealth. *Id.*, p. 79.

An act concerning conveyances or devises for schools, &c. Sess. Acts of 1839, p. 11.

Literary Fund v. Dawson, 10 Leigh (Va.), 147.

An act concerning the estate of Martin Dawson, deceased, and for other purposes. Sess. Acts of 1840–41, p. 52.

An act concerning conveyances or devises of places of public worship. Sess. Acts of 1841–42, p. 60.

Janney's Executor v. Latane, 4 Leigh (Va.), 327.

2d. *The release.*

What, then, is to prevent a decree in this case like that made by the Lord Chancellor in *Morice v. Bishop of Durham*, 10 Ves., 543? “It was the intention to create a trust, and the object being too indefinite, it has failed. The consequence of law is, that the bishop takes the property upon trust, to dispose of it as the law will dispose of it.”

Why not make such a decree in favor of Wheeler? The answer given by the appellees is, that on the 4th of May, 1839, in consideration of \$25,000, he executed a release of

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all his interest in the trust fund, and that the release was legal, equitable, and binding.

And so the question is, Was the *res gesta* of May 2d, 3d, and 4th, terminating in the execution of an instrument of writing called a release, a *bonâ fide*, legal, and valid transaction, on the one hand, or was it, on the other, an illegal, inequitable, and void transaction? It will be contended that it was an illegal, inequitable, and void transaction, because of the partiality and misconduct of the trustees, as set forth in the bill.

But the release, executed under the circumstances detailed in the bill, is supposed to be invalid on other grounds.

1. Wheeler was misinformed in matter of law, however innocently, by Mr. Taylor, an old and trusted friend of his *68] uncle, *executor of his will, and one for whom he, Wheeler, entertained "an habitual and profound respect." He confided in Mr. Taylor's statement of the law, and was misled.

2. Wheeler was left in ignorance of the amount of the residue, which he was called on to release. He signed the release in ignorance. Here, then, was surprise in matters of fact.

This view is sustained by *Pusey v. Desbouvrie*, 3 P. Wms., 315, and Story's comments on it. 1 Story, Eq., §§ 117, 118. See also *Evans v. Llewellyn*, 1 Cox, 333; 1 Story, Eq., § 191. See 1 Story, Eq., § 119; see also *Id.*, 133, note to § 120.

It is submitted that, on the principles settled by these authorities, the release was void.

But there is still another view of this part of the case, which ought to be conclusive against the validity of the release. The question of the validity of the release cannot arise, or be considered by the court, unless and until the court shall have first decided that the devise was void and of no effect, and the pretensions of the Common Council of Alexandria to take under it altogether baseless. The question, then, of the validity of the release, when it comes under the consideration of the court, is virtually a question whether the executors of Charles Bennett, or his heirs at law and next of kin, shall take his estate. The only other claimant, the Common Council of Alexandria, has been already adjudged to have no rightful claim; and the only parties left on the field to contend for the estate are the executors, who hold it in possession, but have not a color of right to it, and the heir at law, who, according to the opinion already formed by the court, is the rightful owner, but for the release.

To sustain the release, then, is to decide that executors have a right to deal with a needy heir or devisee, to practise on his necessities, and to tempt him, by the present payment of a part of what is due to him, to transfer to them all the rest, for their own private and personal use and benefit. No evil intentions are imputed to the executors in this case; but in asking the court to sustain the release, they virtually ask it to give them, clear of all trust and burden, the bulk of their testator's estate. Nothing can be more clear than that an instrument in writing, or contract, whose recognition and validity would lead to such results, is void in equity.

To show that the decision of the Court of Appeals of Virginia in the case *Gallego's Executors v. The Attorney-General* ought to be regarded by the Supreme Court of the United States as the law of this case, the following authorities are relied on. *Elmendorf v. Taylor*, 10 Wheat., 159 and 165; **Jackson v. Chew*, 12 Wheat., 153 *et seq.*; *Blight v. Rochester*, 7 Wheat., 550; *McKeen v. Delancy's Lessee*, [*69 5 Cranch, 22; *Bodley v. Taylor*, 5 Cranch, 221; *Deneale v. Stump's Executors*, 8 Pet., 528-531.

Brand's Administrator v. Brand et al., in Court of Appeals of Virginia. Petition for an appeal from a decree, &c. Appeal prayed on the ground, "that the case of *Hart v. The Baptist Association* was erroneously decided, and erroneously followed in *Gallego's Executors v. The Attorney-General*; that it is now well ascertained that the powers of the chancery court over devises to charities existed prior to the 48d Elizabeth, and that the chancery courts in Virginia may exercise those powers." April 20, 1847, appeal denied.

It is further contended, should the release be operative so as to pass to the defendants all the right and title of the appellant, as next of kin and heir at law of the testator to his residuary estate, that the effect will only be to leave the estate in the residuum subject to the same trusts which are created by the will, and subject to the same objections at law. We further contend that the executors, being trustees, could not purchase from the heir and next of kin as done by the alleged release.

2 Rob. (Va.), 302, 303, *n.* Law of Virginia entitled "An act concerning the estate of Martin Dawson, deceased, and for other purposes." Session Acts, 1840-41, p. 52. *Literary Fund v. Dawson*, 10 Leigh (Va.), 147. Law of Virginia entitled "An act concerning conveyances or devises of places of public worship." Session Acts, 1841-42, p. 60. Act concerning religious freedom, 1787. Glebe lands, &c., 1802.

Act concerning devises for schools, &c. Session Acts of 1839. *Janney's Executors v. Latane*, 4 Leigh (Va.), 327.

On the part of the appellees it was contended,—

I. That the residuary devise is a valid testamentary disposition of the said residuum.

1. That it creates a valid trust, having,—1st. The residuum as its subject-matter; 2d. The executors, as trustees, certainly defined and competent to take; and 3d. A beneficiary certainly defined and competent to take, the Corporation of Alexandria.

The first two points or elements of a valid trust need no remark or support.

3d. That the “town of Alexandria” describes with sufficient accuracy the legal body, the Common Council of Alexandria.

2 U. S. Stat. at L., Feb. 25, 1804, §§ 1, 2, 3, 5, May 13, 1826, § 3, May 20, § 1; *Pr. Man. Co. of the Berks and Dauphin T. P. Co. v. Myers*, 6 Serg. & R. (Pa.), 12, 17; *Road* *70] **Co. v. Creeger*, 5 Har. & J. (Md.), 122, 124; 1 Mon. (Ky.), 175; 10 Co., 122, *b*; *Attorney-Gen. v. Mayor of Rye*, 7 Taunt., 546, 550; Owen, 35; *First Parish v. Cole*, 3 Pick. (Mass.), 232, 237, 240; 2 Lomax's Dig., 208, § 4; *Culpeper Man. and Agr. Soc. v. Diggs*, 6 Rand. (Va.), 165; 3 Lomax's Dig., 150, § 5; Angell on Corp., 77, 78, 150; 1 Jarman on Wills, 330, 331; 2 Stat. at L., 255–257; 4 Stat. at L., 162, 164, 177; Hob., 33; 10 Mass., 390; 10 N. H., 123; 1 Hoffm., 205; Duke, 380, 381.

4th. That the corporation of the town of Alexandria is competent to take the property under the will.

2 and 4 U. S. Stat. at L., Feb. 25, 1804, § 3, May 13, 1826, §§ 2, 3; 3 Lomax's Dig., 12, § 14; 2 Thomas's Coke, 184, 185, note 2; 1 Lomax's Dig., 577, § 8; 1 Dru. & War., 258, 294.

2. If not valid as an ordinary trust between private persons for private purposes, it is valid as a gift to a charitable use.

The degrees of certainty requisite in the beneficiary vary with the object. For private purposes, generally, natural persons or corporations alone can take. For public and charitable purposes the law recognizes the general public, or definite portions of it, not incorporated, as competent to take; and the town of Alexandria is such a beneficiary, under the law of charitable uses.

Mayor of New Orleans v. U. States, 10 Pet., 662; *City of Cincinnati v. Lessees of White*, 6 Pet., 431; *Barclay et al v. Howell's Lessee*, 6 Pet., 498; *Beatty and Ritchie v. Kurtz*, 2

Pet., 566; *The Incorp. Soc. of Dublin v. Richards*, 1 Dru. and War., 294; *Attorney-Gen. v. Mayor of Dublin*, 1 Bligh, 312, 346, 349; *Vidal v. Girard's Executors*, 2 How., 127; *Widman v. Lex*, 17 Serg. & R. (Pa.), 88; 2 Inst., 200; 1 Thomas's Coke, 30; 1 Bl. Com., 89; Duke, 131, 154, 155, 163; 1 Hoffm., 239, 266; 7 Vt., 276, 319; 4 Dana (Ky.), 356, 358; 2 Russ., 417, 419, 420; 6 Paige (N. Y.), 649; 7 Id., 77, 78, 79.

That the gift for such purposes as should be "most beneficial to the town and trade of Alexandria," creates and describes a public charitable use. 2 Pet., 566; 2 Story, Eq. Jur., §§ 1190, 1191; 2 How., 189; *Mayor of London's Case*, Duke, by Bridgman, 380, 381; 2 Story, Eq. Jur., § 1170; 1 Ch. Cas., 267; *Attorney-Gen. v. Platt*, Rep. Temp. Finch, 221; Duke, by Bridgman, 356, 374, 375; *Wingfield's Case*, and also *Pennyman v. Jenny*, Id.; Stat. 43 Eliz., Ap. 1 Dru. & War., or Eng. Stat. at L.; *Baptist Ass. v. Hart's Executors*, 4 Wheat., 1; 17 Serg. & R. (Pa.), 88; *Town of Pawlett v. Clark et al.*, 9 Cranch, 272, 338; *Shotwell's Executor v. R. Mott*; *McCartee v. Orph. Ass.*, 9 Cow. (N. Y.), 437; Duke, 380, 381; 1 Turn. & R., 270, *271; 4 Ves., 542, 544, [*71 551; 2 Sim. & St., 67, 76, 77; 1 Philips, 185, 190; 2 Roper and White, Leg., 1119, ch. 19, § 1; 1 Keen, 232; 1 Hoffm. (N. Y.), 239, 266; 4 Dana (Ky.), 356, 358.

II. If the residuary devise and bequest be void, the release bars the complainant's claim, unless it be avoided.

It is not averred to have been obtained by fraud, nor by duress, nor by surprise, but only, "that on the statement of facts herein before made, the release aforesaid was void in equity, and in no way binding on him as a release."

But first,—

1. The instrument is not a release merely, i. e. of an acknowledged right, for a consideration, but a compromise of a contested and doubtful claim. *Leonard v. Leonard*, 2 Ball & B., 171, 180; 2 Sim. & S., 555, 564, 566; 5 Pet., 99, 114.

2. The "circumstances aforesaid" do not show a case either of fraud or duress, or of hasty and inconsiderate action, under undue influence, operating a surprise, such as a court of equity will relieve against. 1 Story, Eq. Jur., § 251; *Earl of Bath and Montague's case*, 3 Ch. Cas., 56, 74, &c., and Somers's remarks, 114; *Evans v. Llewellyn*, 1 Cox, 333, 341; *Leonard v. Leonard*, 2 Ball & B., 171, 179, 180, 181; *Cory v. Cory*, 1 Ves., 19; 1 Story, Eq. Jur., §§ 116, 131, and note 4; *Stewart v. Stewart*, 1 C. & F., 911, 954; *Brown v. Prig*, 1 Ves. Sr., 407, 408; *Bent v. Barlow*, 3 Cro. C. C., 451; *Blackford and Wife v. Christian*, 1 Knapp, 77, 78; 1 Sim. & S., 555, 564, 566; 3 Swanst., 476; 1 Bro. C. C., 22.

III. The complainant has failed to aver his readiness to pay to the defendant the price of the release, and has also failed to bring that money into court; without which a court of equity will not entertain a bill to vacate the instrument.

Mr. Cooke, for the appellant, in reply and conclusion, contended, that the "town of Alexandria" did not mean the "Common Council of Alexandria."

It is worthy of remark, that in this important devise, which disposes of the great bulk of the testator's property, real and personal, not a word is said about "the Common Council of Alexandria," the body politic created by an act of Congress to administer the affairs of the town. And yet it can scarcely be doubted, that the name, power, and functions of that body were as familiar to the testator as household words. It is difficult to account for this significant silence, but by supposing that the testator had determined that the corporate authorities of the town should have no agency whatever in carrying out the beneficent purposes vaguely suggested by his will.

*72] *In what character, indeed, could the corporation act, without deranging the scheme set forth in the devising clause above quoted? Not in the character of trustees; for the testator had selected as trustees, to carry out his purposes, three highly esteemed personal friends, including an eminent lawyer; three men of whom he had emphatically said, that they had "all the confidence which he could repose in man"!

If that part in the drama was filled, what other part could the corporation perform? The part of beneficiaries,—of persons to receive and enjoy the bounty of the testator? That were absurd.

The testator's motive or reason for excluding the corporation from all participation in the trust was probably his want of confidence in the wisdom of a fluctuating popular body; or, in other words, his conviction of their incapacity to manage so difficult a trust.

That it was a difficult trust, a single glance at the testator's crude and undigested plan will clearly show. When the testator described the selected objects of his bounty as "the town and trade of Alexandria," he meant neither the ground included within the territorial limits of the town, nor the Common Council of the town. He meant the people of the town, and especially the traders, having been a trader himself during the greater part of an active life. He wished a scheme or detailed plan to be devised and executed, by

which a fund of about \$120,000 should be so used as to confer on the objects of his bounty the greatest degree of benefit which such a fund could confer on beneficiaries so numerous. Nothing could be more difficult than the conception and execution of the details of such a half-formed scheme. Talents, legal learning, and zeal, he thought he had found in his three trusted friends; in the Common Council he had no right to expect any one of these essential qualities. He felt, himself, that he was wholly unequal to the task, and he did not think that the Common Council was likely to be more capable than himself.

The result of this inquiry into the true intent and meaning of the 20th clause of the will is, that the idea of making the "Common Council of Alexandria" beneficiaries under the will is a solecism, since beneficiaries are those who take and enjoy, while a corporation can take only in trust for those who are to enjoy; that the beneficiaries contemplated by the testator were the people, and especially the traders of Alexandria; and that the only inference which can be reasonably made from the omission of the testator to mention the Common Council is, that he intended that they should have nothing whatever to do with the trust, in any character; [*73 an inference which is sustained by the fact that he selected others, to wit, his attached and personal friends, to perform the only functions which the Common Council were capable of performing, namely, the functions of trustees. How deficient in legal certainty the whole scheme of the trust was will in due time be shown.

Mr. Cooke then contended that this devise in the will was revoked in the codicil, and superseded by one of a still more vague and indefinite character, investing the trustees with a still more ample and even unlimited discretion.

After examining this point, *Mr. Cooke* proceeded to show that the devise in the will (and *a multo fortiori* the devise in the codicil) creates, or attempts to create, a trust which is void for uncertainty, and one which a court of chancery will not and cannot enforce, on the general or ordinary principles of trusts.

In support of this proposition, he cited Story on Equity, *Trusts*, § 979 a, and commented on the authorities there referred to, and 3 Leigh, 450-491.

The devise to which these doctrines are to be applied is a devise "in trust for such purposes as my executors consider promises to be most beneficial to the town and trade of Alexandria."

The principal classes in every seaport town are professional

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men, manufacturers, including handicraftsmen, navigators, and traders, or men whose business it is to buy and sell for profit. The testator was himself a trader, and the fair inference from the fact that he mentions that class only is, that he intended that they should be specially benefited. But how and to what extent they were to be preferred, the testator has omitted to say. In this respect, then, the devise is vague and uncertain. But, waiving this discrimination between the traders and the people in general, it has been shown that the people, and not the "Common Council" of Alexandria are the real beneficiaries. It has been shown that the testator intended to exclude the Common Council from all agency in the trust, and from all benefit. The Common Council could act only as trustees, and that office is filled by the executors.

It is a fatal objection to this trust, therefore, that there is no beneficiary capable of filing a bill against the trustees to enforce the trust. The people and traders of Alexandria were a continually fluctuating body of men, incapable, on the plainest and most elementary principles, of instituting and carrying on a suit in law or in equity.

But suppose that this uncertain and ever-changing body, "the people and traders of Alexandria," or suppose, if you will, *that "the Common Council," or any conceivable *74] representative of the beneficiaries, were permitted to exhibit a bill against the trustees for relief. How could they, under this devise, define the relief to be given to them? Or, if they asked for general relief only, how could the court, under this devise, undertake to define the relief to which the beneficiaries were entitled? The mode of applying the fund to their benefit is left to the absolute and unlimited discretion of the trustees or executors. Could the court decree that the fund should be invested in stocks, and the proceeds applied to the diminution of the poor-rates? Could the court decree that a portion of the principal or accruing interest should be lent to young traders just entering into business, and another portion to embarrassed traders, who could give good security to repay the loan? Could the court decree that the whole fund should be applied to the extinguishment of so much of the debt of the corporation? Or is there any other conceivable appropriation of the fund or its interest which would not be liable to the overruling objection of the trustees, "that they do not consider such appropriation as promising to be most beneficial to the town and trade of Alexandria"?

Suppose that, to get clear of this difficulty, the court were

to order the trustees to report to the court such a scheme as promises in their opinion to be most beneficial to the town and trade of Alexandria, and that the trustees were to disregard the order? What would be the remedy? Could the court do more, as against them, than annul the powers of the trustees, and take the fund out of their hands? Suppose that this were done. The question would still recur, What is to be done with the fund?

And how would the court relieve itself from this difficulty? Why, simply by referring to one of its canons, laid down by Judge Story in his Equity Jurisprudence, § 979, *a*,—"Courts of equity carry trusts into effect only when they are of a certain and definite character." And to another canon laid down by the same jurist, in § 979, *b*, that when such uncertain and indefinite trust is created by a will, the property passes to the next of kin or heir at law.

So in the case of *Morice v. Bishop of Durham*, 10 Ves., 542, the Lord Chancellor said,—“It was the intention of the testatrix to create a trust; and the object, being too indefinite, has failed. The consequence of law is, that the trustee takes the property upon trust, to dispose of it as the law will dispose of it. I think, therefore, the decree is right.” The Master of the Rolls had decreed a distribution of the trust fund among the next of kin.

**Mr. Cooke* then contended that the devise could not be sustained by being brought within the doctrine [*75 of “charities,” because the courts in England would only protect those charities specially enumerated in the statute of 43d Elizabeth, within which classes this devise could not be included. 2 Story, Eq., § 1160; 2 Fonbl. Eq., Book 2, part 2, ch. 1, note *b*; 2 Story, Eq., §§ 1155–1158, 1183, and authorities there cited.

Mr. Cooke then examined how far the release was binding upon Wheeler, and commented on the following circumstances:—

1. The straitened circumstances of William Wheeler.
2. The knowledge in the executors of his straitened circumstances.
3. The shortness of the notice to the heir at law of the intended probate.
4. The preliminary conference with Mr. Smith, in which that gentleman “spoke much and earnestly of the inevitable delay and vexation of a suit.” “The will would be thrown in chancery, where it would remain for years.” “A course might be taken by which expense and delay might be avoided.”

5. Mr. Taylor, at the conference, said that there was but one opinion in the bar, and that was in favor of the validity of the devise.

6. Mr. Taylor said his own opinion was, that the devise in question was a legal and valid disposition of the residue of the estate. "When your orator, now greatly disheartened, intimated, deferentially, that he had taken up a contrary opinion, Mr. Taylor said that he admitted that in Pennsylvania such a devise would not be good, but that it was good under the old law of Virginia, as it existed at the time of the cession of the town of Alexandria by Virginia, which law was the law of the County of Alexandria up to the time of Bennett's death."

7. An undoubting confidence was expressed in the ultimate result of the suit. But, "to avoid the delay of a lawsuit, they were willing to pay for a release of your orator's claim, however untenable and desperate." (Substance stated, and not the words used.)

8. That Mr. Taylor was a man of "commanding intellect," and the plaintiff "entertained for him an habitual and profound respect."

9. That plaintiff, "having no distinct or settled views of the legal question thus suddenly forced upon him, or time to form any,—fevered by a rapid journey,—his spirits depressed by the recent death of his last kinsman, to whom he had *76] been tenderly *attached,—and flurried and confused by the magnitude of the question he was called on to decide, and the necessity of deciding it at once,—felt himself wholly overpowered, and strongly inclined to succumb to the views so forcibly presented to him. And these views were, moreover, recommended to his favorable consideration by the offer, so tempting to a man in his situation, of a large sum of money without delay or further trouble."

10. "Your orator was given to understand that the will would and must be offered for probate on the next day."

11. It was impossible, in the time allowed him, to obtain counsel. "He was, therefore, compelled to decide, without the aid of counsel, whether he would make the legal validity or invalidity of the devise the basis of his action; and being entirely in the dark, he concluded that the only safe course was to consider the devise void, and take what he could get for a release."

12. It was under this duress of circumstances that he agreed to release his whole interest of \$25,000.

Mr. Justice McLEAN delivered the opinion of the court.

This controversy arises under the last will and testament of Charles Bennett, late of Alexandria. After making a number of specific bequests, the testator declares,—“The residue of my estate is left in trust of Hugh Smith, Robert I. Taylor, and Phineas Janney, for such purposes as they consider promises to be most beneficial to the town and trade of Alexandria. If any difficulty occurs in construction as to any of my bequests, R. I. Taylor is especially charged to give said construction.” Smith, Taylor, and Janney were appointed executors.

In a codicil the testator declares,—“Now in the inclosure I leave the residue of my estate, after paying all bequests and appropriations, to some disposition thereof which my executors may consider as promising most to benefit the town and trade of Alexandria. Now I leave the same entirely to their disposition of it, in such manner as appears to them promises to yield the greatest good.”

The complainant, William Wheeler, is next of kin and heir at law to the testator. He filed his bill to set aside the above devise, and also the compromise he made with the executors, under the impression that the devise was valid.

On reading the above residuary disposition of his estate, we cannot but observe the fact, that the testator had no settled purpose as to the mode of applying his bequest to “benefit the town and trade of Alexandria.” The town and trade of any *commercial city are closely connected, [*77 and whatever shall benefit the one will advance the interest of the other. These interests are inseparably blended; but they were treated by the testator as distinct objects of his solicitude and bounty. Perhaps no matter could give rise to a greater diversity of opinion, than that which is involved in this devise. Shall the objects of the testator be most advanced by extending the lines of internal communication connected with the town, such as turnpike roads, railroads, or canals; or by improving and extending the wharves and warehouses of the city; or by deepening the harbour and removing obstructions to navigation; or by loaning the capital to men engaged in commerce; or by aiding some other enterprise beneficial to the trade and town? Shall the bounty be limited to our own citizens, if foreigners shall do more than they, to carry out the expressed objects of the testator?

Under this devise, how can a court of chancery correct an abuse of the trust? By what means shall it ascertain the misapplication of the fund? There is nothing to restrain the

discretion of the trustees, or to guide the judgment of the court. If the trust can be administered, it must be administered at the will of the trustees, substantially free from all legal obligation.

But before we pronounce on the character of this trust, it is important to know by what law it is governed. Is the common law of England in relation to charities, as modified and enlarged by the statute of the 43d of Elizabeth, in force in Virginia? Charities have been administered, both at common law and in chancery, from an early period of English jurisprudence. But the earlier decisions in that country are often inconsistent, and of no great weight of authority. The prerogative of the king was invoked as *parens patriæ* where the charity was indefinite, and a most liberal construction was given to the act of the 43d of Elizabeth; and under these influences a system has grown up in England favorable to the policy of charitable bequests. So far has this policy been carried, that where the devise has been uncertain or impracticable, it has been sustained in some instances by what was supposed to be the intent of the testator, or by approaching as near to it as practicable.

It would seem from the preamble to the statute of Elizabeth, that its object was mainly to institute a remedy where the charitable intent of the founders had not been carried out, by reason of frauds, breaches of trust, and negligence in those that should pay, &c. All the objects specified in that statute are denominated charities, though they embrace *78] "the repairing of *bridges, ports, havens, causeways, churches, sea-banks, highways," &c. There are some cases of charity, from their nature, though not specified in the statute.

Whether this policy has been wisely cherished by the English government is not a matter for our consideration. Charitable bequests, from their nature, receive almost universal commendation. But when we look into the history of charities in England, and see the gross abuses which have grown out of their administration, notwithstanding the enlarged powers of the courts, aided by the prerogative of the sovereign and the legislation of Parliament, doubts may be entertained whether they have, upon the whole, advanced the public good.

When this country achieved its independence, the prerogatives of the crown devolved upon the people of the States. And this power still remains with them, except so far as they have delegated a portion of it to the Federal government. The sovereign will is made known to us by legislative enact-

ment. And to this we must look in our judicial action, instead of the prerogatives of the crown. The State, as a sovereign, is the *parens patriæ*.

The common law, it is said, we brought with us from the mother country, and which we claim as a most valuable heritage. This is admitted, but not to the extent sometimes urged. The common law, in all its diversities, has not been adopted by any one of the States. In some of them it has been modified by statutes, in others by usage. And from this it appears that what may be the common law of one State is not necessarily the common law of any other. We must ascertain the common law of each State by its general policy, the usages sanctioned by its courts, and its statutes. And there is no subject of judicial action which requires the exercise of this discrimination more than the administration of charities. No branch of jurisprudence is more dependent than this upon the forms and principles of the common law.

In this view, we must look to the laws of Virginia as governing this bequest. Alexandria was ceded to the Union by Virginia in 1801, but the laws of that State, as they then existed, remained in force over the ceded territory. It has since been retroceded to Virginia. By an act of the Virginia Legislature in 1789, followed by one in 1790, a commission was appointed on English statutes, and in the act of 1792 all English statutes then in force were declared to be repealed; "the Legislature reciting that, at that session, it had specially enacted such of them as appeared worthy of adoption." The statute of the 43d of Elizabeth, if it ever was in force in Virginia, was repealed by the above act.

*Some of the principles applicable to this case were considered by this court, in the *Baptist Association v. Hart's Ex'rs*, 4 Wheat., 1. Hart, a citizen of Virginia, made his will, which contained the following bequest:—"Item, what shall remain of my military certificates at the time of my decease, both principal and interest, I give and bequeathe to the Baptist Association that for ordinary meet at Philadelphia annually, which I allow to be a perpetual fund for the education of youths of the Baptist denomination, who shall appear promising for the ministry, always giving a preference to the descendants of my father's family." In that case, the court held that "charitable bequests, where no legal interest is vested, and which are too vague to be claimed by those for whom the beneficial interest was intended, cannot be established by a court of equity, either exercising its ordinary jurisdiction, or enforcing the prerogative of the king as *parens patriæ*, independent of the statute 43d Elizabeth." [79]

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And it was said the statute of 43d Elizabeth had been repealed in Virginia.

In the case of *Gallego's Ex'rs v. The Attorney-General*, 3 Leigh (Va.), 450, the court held that "the English statute of charitable uses, 43 Elizabeth, having been repealed in Virginia, the courts of chancery have no jurisdiction to decree charities where the objects are indefinite and uncertain."

"If a trust be created in a party, but the terms by which it is created are so vague and indefinite that courts of equity cannot clearly ascertain either its objects or the persons who are to take, then the trust will be held entirely to fail, and the property will fall into the general funds of the author of the trust." Story, Eq. Jur., § 979, a. "So, where a testatrix bequeathed the residue of her estate to her executors, 'upon trust to dispose of the same at such times, and in such manner, and for such uses and purposes, as they shall think fit, it being my will that the distribution thereof shall be left to their discretion,'" it was held to be void for uncertainty. Id., § 979, b.

In *Wright v. Atkyns*, 1 Turn. & R., 157, Lord Eldon said, that in order to determine whether a trust of this sort is a trust which a court of equity will interfere with, it is matter of observation, first, that the words should be imperative; secondly, that the subject must be certain; and thirdly, that the object must be as certain as the subject. This principle is also strongly illustrated in the case of *Wood v. Cox*, 2 Myl. & C., 684; 10 Leigh (Va.), 147.

In *Morice v. The Bishop of Durham*, 10 Ves., 521, where a bequest "in trust for such objects of benevolence and liberality as the trustee in his own discretion shall most approve, *80] cannot *be supported as a charitable legacy; and is therefore a trust for the next of kin." This was under the statute of 43d Elizabeth. The court said, "The trust must be of such a nature that the administration of it can be reviewed by the court; or if the trustee die, the court itself can execute the trust." And the court remark, in regard to the case before them, "The trustee takes not for his own benefit, but for purposes not sufficiently defined to be controlled and managed by this court."

The case of *Vidal v. Girard's Ex'rs*, 2 How., 127, was decided under the law of Pennsylvania. The court say, "It has been decided by the Supreme Court of Pennsylvania, that the conservative principles of the statute of Elizabeth have been in force in Pennsylvania by common usage and constitutional recognition."

In a late case in Virginia, not yet reported, of *Brand's Adm'r v. Brand et al.*, the following devise was held to be void:—"Third, I give to the Rev. W. J. Plummer, D. D., the residue of my estate, both real and personal, in trust for the board of publication of the Presbyterian Church in the United States."

From the principles laid down in the above cases, it is clear that the devise under consideration cannot be sustained. A trust is vested in the executors, but the beneficiaries of the trust are uncertain, and the mode of applying the bounty is indefinite. It is argued that the testator intended to give to the town of Alexandria, in its corporate capacity, the residuum of his estate. But he did not so express himself. On the contrary, it clearly appears that the executors were made the repositories of his confidence, and the only persons who were authorized to administer the trust. The *cestui que trusts* were the town and the trade of the town. It would be difficult to express in more indefinite language the beneficiaries of a trust. How can a court of chancery administer this trust? On what ground can it remove the trustees for an abuse of it? The discretion of the trustees may be exercised without limitation, excepting that the fund must be applied for the benefit of the trade and town of Alexandria. And if the application of the fund be, however remotely, connected with the objects of the trust, the judgment of the court could not be substituted for the discretion of the trustees. It is doubtful whether so vague a bequest could be sustained under the 43d of Elizabeth. Without the application of the doctrine of *cy-pres*, it could not be carried into effect. In Virginia charitable bequests stand upon the same footing as other trusts, and consequently require the same certainty as to the objects of the trust and the mode of its administration.

*But the defendants insist, that the right of the complainant was compromised and finally settled, [*81 which is shown by a writing under seal, and under which they paid to him twenty-five thousand dollars. The complainant prays that this agreement may be set aside as inoperative and void.

It appears from the bill, that the complainant resides in the State of Pennsylvania, and that so soon as he could raise the means of paying his expenses, after he heard of the death of his uncle, he came to Alexandria. He had an interview with the executors, and stated to them his determination to test the validity of the will, so soon as he should be able to employ counsel. This was before the probate of the will. Mr. Smith, one of the executors, expressing great kindness for

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him, was anxious to avoid a law suit. He did not fear the result, as the executors had been advised by counsel in whom they had confidence, that the will was valid. He represented the vexations, delays, and expenses of a lawsuit, and intimated to the complainant that the executors were willing to pay a sum of money to him if the matter could be compromised.

It appears that the complainant had been prodigal in his expenditures, and that, notwithstanding the provisions for his support which had been made for him by his uncle, he was without means and embarrassed. When the interview took place which led to the compromise, the complainant again expressed his conviction that the will was not valid, and declared that he should try its validity by legal proceedings. Mr. Taylor, one of the executors, was a distinguished lawyer, a man of high standing, and in whom the complainant reposed the greatest confidence; he represented to the complainant that he had sundry written opinions of counsel in favor of the legal validity of the residuary devise, which he offered to show to him. His conversation conveyed to the complainant "the clear and distinct impression, that there was but one opinion among the lawyers consulted, and that they were unanimous in favor of the validity of the devise." The complainant asked Mr. Taylor to state his opinion on the subject. He observed, that the complainant should not have asked him, but his opinion was, "that the devise in question was a legal and valid disposition of the residue of the estate." At the same time, he admitted that in Pennsylvania such a devise would not be good; but that it was good under the old law of Virginia.

The complainant alleges that he had no settled views of the legal question, and being disheartened by the circumstances under which he was placed, he yielded to the compromise. He had but little time for reflection, and none to advise with *82] *counsel; and at last he came to the conclusion to consider the devise valid, and take what he could get for a release.

Under these circumstances, the complainant agreed to the compromise. It stated the residuary devise, and that its validity had been controverted by the complainant. That the "said executors, taking on themselves the burden of the execution of said will, and of the trust aforesaid, and the said William Wheeler, to avoid the delay and expense of litigation, and finally to settle and adjust all doubts and difficulties which might arise on the effect of said will, so as to leave the said executors to execute the same without delay

or impediment, have agreed on the following terms of compromise."

1st. That twenty-five thousand dollars shall be paid to the complainant. 2d. That the executors shall release to him all claims to any property, real or personal, conveyed or settled on complainant by the testator in his lifetime. 3d. That the complainant shall release to the executors "all his claims, in law or equity, to the estate, real and personal, devised and bequeathed, or intended to be devised or bequeathed, by the said Charles Bennett by his said will, to be held and disposed of by the said executors in the manner in and by the said will prescribed. And that the said executors shall be at liberty, if any specification of the objects to which the residuary fund is to be applied be thought necessary, to apply the same to aid in finishing the Alexandria Canal, &c., and to subscribe to any railroad or other roads communicating with the said town; to any or to all of the above purposes, in such way as the said executors, or the survivors, may think most conducive to the prosperity and welfare of the town," &c.

The complainant, it seems, had studied law, but it is manifest from the facts before us, that he was but little acquainted with business, was an inefficient and dependent man, easily misled, especially by those for whose abilities and characters he entertained a profound respect. From the high character of the executors, no one can impute to them any fraudulent intent in this transaction. Looking to what they considered to be the object of the testator, they felt themselves authorized, if not bound, to effectuate his purposes by making this compromise with his heir at law. They had no personal interest beyond that which was common to the citizens of Alexandria. And we admit that they may have acted under a sense of duty, from a misconception of their power under the will.

But in making the compromise, the parties did not stand on equal ground. The necessities and character of the complainant were well known to the executors. Having the *confidence expressed in the validity of the devise, [*83 they could hardly have felt themselves authorized to pay to the complainant twenty-five thousand dollars for the relinquishment of a pretended right. Nor could they have deemed it necessary, in the agreement of compromise, substantially to constitute him the donor of the munificent bequest to the town and trade of Alexandria.

We are to judge of this compromise by what is stated in the bill, the facts being admitted by the demurrer. And it appears to us that the agreement, under the circumstances,

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is void. It cannot be sustained on principles which lie at the foundation of a valid contract. The influences operating upon the mind of the complainant induced him to sacrifice his interests. He did not act freely, and with a proper understanding of his rights.

The decree of the Circuit Court is reversed, the demurrer overruled, and the cause remanded for further proceedings.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Alexandria, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs, and that this cause be, and the same is hereby, remanded, for further proceedings to be had therein in conformity to the opinion of this court.



THE UNITED STATES, APPELLANTS, v. ELI R. PRICE, EXECUTOR OF JOSEPH ARCHER.

SAME v. SAME.

Where there were joint and several bonds given for duties, and the United States had recovered a joint judgment against all the obligors, and then the surety died, it was not allowable for the United States to proceed in equity against the executor of the deceased surety for the purpose of holding the assets responsible.¹

THESE two cases were brought up, by appeal, from the Circuit Court of the United States for East Pennsylvania, sitting as a court of equity.

The United States filed a bill on the equity side of the *84] *court at October term, 1843, against the executors of Joseph Archer, deceased, claiming to recover from the estate of said Archer the amount of certain duty bonds, or part thereof. The two cases were alike, except that in one

¹ DISTINGUISHED. *Richardson v. Draper*, 87 N. Y., 344, 345. NOT FOLLOWED. *Mays v. Cockrum*, 57 Tex., 353, 354. CITED. *Pickersgill v. Lathens*, 15 Wall., 144; *Hudelson et al. v. Armstrong et al.*, 70 Ind., 101; *Dixon v. Vaudenberg*, 8 Stew. (N. J.), 49. See *Bispham v. Price*, 15 How., 162.

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the bonds were signed by Mifflin and Archer, and in the other by Mifflin, Archer, and one Foster. This made some difference in the argument of the cases; but the point upon which the court rested its decision was common to both cases, and renders it unnecessary to notice this difference further.

There was no controversy about the facts in the case, which were these.

In 1828, James L. Mifflin was the owner and importer of three invoices of goods by the ship *Nassua*, from Canton, to the port of Philadelphia, and said Mifflin duly entered them in the custom-house. Bonds to the United States for the payment of the duties, under the then existing law, were executed by the said James L. Mifflin, the owner and importer, as the principal debtor, and William Foster and Joseph Archer as sureties. The bonds were joint and several, and in the usual form.

In 1829, the United States obtained judgments against all the obligors (Mifflin, Foster, and Archer, then living) in these bonds, upon their joint responsibility, in a suit at law in the District Court of the United States for the Eastern District of Pennsylvania. The judgments were against them jointly, and no process issued against them severally at any time.

In 1840, William Foster, a co-defendant in the judgments and a co-security in the original bonds, after his release by the United States (1833), died insolvent.

On September 28, 1841, Joseph Archer, the co-defendant in these judgments and a co-security in the original bonds, died, and his executor is the defendant in this proceeding in equity.

James L. Mifflin, a co-defendant in these judgments and the principal in the original bonds, was surviving at the date of the filing of this bill and the decree.

The bill, after setting forth the execution of the bonds by Mifflin and Archer, and the recovery of the judgments against them, charges that Mifflin, at the time, and long before the death of Archer, was utterly insolvent and unable to pay his debts; that he had been discharged as an insolvent debtor under the insolvent acts of Pennsylvania, before the death of Archer, and since that event he had been discharged as a bankrupt, under the act of Congress passed in 1841, to establish a uniform system of bankruptcy throughout the United States. The bill further charges that Archer, in his lifetime, and at the time of his decease, being seized of real estate and possessed *of a very considerable personal estate, made his last will, and departed this life on the 24th of Sep- [*85

tember, 1841, leaving the same unrevoked, and appointing the defendant his executor, as set forth in the bill. And the complainants aver that the whole of the principal sums, with arrears of interest, and costs of the said bonds and judgments, are still due and payable to the United States, and that by law and equity they are entitled to be paid out of the assets of Archer's estate, in preference to all other creditors, legatees, or devisees, and charge that the executor has been selling and disposing of the estate, and wasting the same, to their injury and loss, and in derogation of their rights. After certain interrogatories, the United States therefore pray, that an account may be taken of the amount due them for principal, interest, and cost; and also an account of the personal estate of the testator, which came to the hands of Price and Bispham, as executors, and to the hands of Price since the discharge of Bispham as executor; and that they shall be decreed to pay to the United States what shall appear to be due and owing to them out of the testator's personal estate, in a due course of administration. And in case the same shall be insufficient for the purpose, then, out of the real estate of which the testator died seized, to make good any such deficiency; and that the right of the United States to a preference in payment out of the said assets, estate, and effects, and the proceeds thereof, may be decreed and established, and for further relief.

The answer admitted the execution of the bonds, and averred that Mifflin was principal and Archer surety. It admitted also the sufficiency of assets and the facts stated above, submitting the case to the judgment of the court upon them.

In October, 1846, the cause came on to be heard upon bill, answer, and exhibits, when the Circuit Court dismissed both bills.

An appeal from this decree brought the cases up to this court.

They were argued by *Mr. Johnson* (Attorney-General), for the appellants, and by *Mr. Miles*, for the appellee.

Mr. Johnson, for the United States, made several points, but as the decision of the court turned upon a single one, it is only necessary to notice that one, viz. :—

II. That the bonds were several as well as joint, and each obligor was therefore responsible for the whole debt; and that the joint judgments upon the bonds did not, for the purposes of the present cases, take from the United States the right to

consider the estate of Archer as responsible for the whole debt, which they could have done before judgment. *United States v. Cushman*, 2 Sumn., 434, and cases therein [*86 cited; *Jackson v. Thorpe*, 2 Younge & Coll., 562.

Mr. Miles, for the appellee, made the following points:—

1. The judgment having been obtained against the obligors jointly, the severalty of the original obligation is determined by the act of the plaintiffs, and the bond is merged in the judgment. If two or more are bound jointly and severally, the obligee may elect to sue on either the joint or several obligation, and if he elects the former, and proceeds to judgment, he cannot afterwards proceed on the latter.

“It is at the election of the obligee to consider such a bond either as a joint or several one.”

Pitman on Principal and Surety, 85; *Higgins's case*, 6 Co., 44; *Putt v. Rawsterne*, Poll., 641; *Brown v. Wootten*, 2 Vent., 348; *Minor v. Merchants' Bank*, 1 Pet., 73; *Downey v. Bank*, 13 Sug. & R. (Pa.), 288; *Walter v. Ginrich*, 2 Watts (Pa.), 204; *Reed v. Garvin's Ex.*, 7 Sug. & R. (Pa.), 355; *McFall v. Williams*, 2 Id., 280; *Stoner v. Strornan*, 9 Watts & S. (Pa.), 88; *U. States v. Thompson*, 1 Gilp., 622 (case of duty bonds); *Kennedy v. Carpenter*, 1 Whart. (Pa.), 364; *U. States v. Cushman*, 2 Sumn., 310; 1 Saund., 291, n.; Cro. Jac., 73; 1 Chit. Pl., 35; Com. Dig., Action, K. 4; 5 Bac. Abr., *Obligation*, D. 4; 3 T. R., 782; Hurlstone on Bonds, 98; 2 Lev., 228; 1 Ves. & B., 65.

Per C. J. Tilghman:—“A joint and several obligation may be proceeded on either as a joint or several contract, at the choice of the obligee. Having treated it as joint, he cannot afterwards consider it several.” This, although but one be served, and judgment against him only.

Per Kennedy, J.:—“It cannot be questioned that the judgment obtained against the obligors, in an action brought against them jointly, merged the bond, so that no subsequent action against the obligors, either jointly or severally, could be maintained thereon.”

This doctrine is impliedly admitted by Mr. Justice Story, in the proceeding at law before him.

2. The result of this is:—

1. The bond being merged in the joint judgment, the plaintiffs, up to the time of its rendition, had “a remedy in law.” That remedy continues against the survivor. Hence no equity jurisdiction.

2. If it were that an obligee, who has obtained a joint judgment against all the obligors, might afterwards sue them or

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their representatives severally, the plaintiffs have a "remedy at law," and cannot invoke the aid of a court of equity. *87] The basis of the bill is, that the plaintiffs have no remedy at law.

3. On the rendition of the joint judgment, Mifflin and Archer stood in the relation of joint contractors or judgment debtors, with all the incidents thereto appertaining in law and equity. Among them are,—

1. Acceptance of a judgment against one; a discharge of the others.

2. Release of one discharges all.

3. The death of one joint debtor discharges his estate (except by statutory lien on real estate, which is not the case here), casts the burden on the survivors, and the remedy at law is only against the survivors.

4. Other matters occurring after the rendition of the judgment (see propositions which follow), discharged the right against the estate of Joseph Archer, and for want of right there was no remedy either in law or equity.

At law, the death of Joseph Archer, a co-debtor in the joint judgment, after its rendition, discharged his assets, and no action at law lay against his executor, upon the bond, being merged in the judgment, or upon the judgment itself, the only proceeding at law being against the surviving defendant therein.

1. The plaintiffs' bill impliedly assumes this as to the remedy, or otherwise they could not come into equity at all.

2. The plaintiffs' right in law against the assets of the decedent is *ipso facto* by the death defeated. And to this point are all the authorities.

Per Kennedy, J.:—"That one of two joint debtors dying is thereby discharged, both in person and estate, at law, from the payment of the debt, is too well established to be controverted." (Only exception, case of special lien on lands, *post.*)

U. States v. Cushman, 2 Sumn., 310; *Reed v. Garvin's Ex.*, 7 Serg. & R. (Pa.), 357; *Lompton v. Collingwood*, 4 Mod., 315; 4 How., 77; *Kennedy v. Carpenter*, 2 Whart. (Pa.), 364; *Towers v. Moor*, 2 Vern., 99; *Foster v. Hooper*, 2 Mass., 572; *Lang v. Keppeler*, 1 Binn. (Pa.), 123; *Smart v. Edson*, Lev., 30; 2 Saund., 51, 148, *a. n.* 4; T. Raym., 26; 1 Sid., 238; Stat. West. 2d; *Stiles v. Brock*, 1 Pa. St., 215, and all the cases collected therein as to special lien on realty by judgment created by statute.

Note.—There is a class of cases which do not interfere with this proposition, and are clearly distinguishable. These are

to the effect, that, where a joint judgment is obtained against more than one defendant,—and by statutes in England and many of *the United States, such judgment is a specific lien on the lands or realty of all the defendants, for [*88 various periods,—in such case a *scire facias* may be issued, to have execution of the lands of a deceased defendant in the hands of executors, terre-tenants, heirs, or devisees, by force of the special statutory provision. This may be coupled with a *scire facias*, to have execution against the goods of the surviving defendants; but the personalty and general assets or estate of the deceased defendant are discharged by his death.

In the present case there was no such specific statutory lien. There was no real estate of Joseph Archer deceased to bind by lien by the judgment in which he was a joint defendant at the time of his decease.

This is a case purely of general assets, and personalty unfettered by any statutory lien, and wholly subject to the general rule, as set forth in this proposition.

In equity, the right and remedy are extinguished, as well as at law, against the estate and assets of Joseph Archer deceased, by reason of his (a joint debtor and surety's) death.

1. In general, if the right against decedent's estate is discharged at law, it must be in equity, because equity creates no other right in favor of a claimant, or liability on the part of those against whom the claim is made, than exists by general law. The distinction between law and equity merely applies to the remedy or its form, and not to rights or duties.

2. But what is conclusive, Joseph Archer was a mere surety, in no wise personally benefited by the consideration of the original transaction, bound only by the original bond and the judgment thereon, who was under no moral obligation to pay; there being no question (in the sense of equity) of accident, fraud, or mistake, and the legal liability of his estate was gone.

The pleadings in this case assume these as facts.

The acts of Congress distinguish between principal and surety, both before and after judgment against them.

After the judgments (rendered in 1829), the plaintiffs recognized, by the release of Foster in 1833, Archer as a mere surety.

Independent of this, and the provisions of the acts in general, the relation of the principal and surety, after judgment, exists as to third persons.

In such case, then, equity will give no relief against the representatives or the estate of the deceased surety, and so are all the authorities, except the hastily considered *Circuit case* in 2 Sumner. *Commonwealth v. Haas*, 15 Serg. & R. (Pa.), 252; *Potts v. Nathans*, 1 Watts & S. (Pa.), 158.

*89] *In *Hunt v. Rousmanier*, 1 Pet., 16, (referring to a class of cases hereinafter mentioned,) the court say, "Equity has afforded relief against the representatives of a deceased obligor in a joint bond given for money lent to both the obligors, although such representatives were discharged at law. The principle upon which these cases manifestly proceed is, that, the money being lent to both, the law raises a promise in both to pay, and equity considers the security of the bond as being intended by the parties to be coextensive with this implied contract by both to pay the debt."

In *Waters v. Riley*, 2 Harr. & G. (Md.), 310, the Court of Appeals of Maryland say that the rule is, "When the remedy at law is gone, chancery will not revive it, in the absence of any accident, fraud, or mistake; to which the case of a bond where all are principals has been held to be an exception, each being equally benefited, and under an equal moral obligation to pay the debt, independent of the bond, to which equity relates back, when the remedy on the bond at law is gone. But in case of a surety who is bound only by the bond itself, and is not under the same moral obligation to pay, equity will not interfere to charge him beyond his legal liability."

The Supreme Court of Pennsylvania, per C. J. Tilghman, say, of all the cases cited in reference to this question, "So far from establishing any principle by which the estate of the deceased obligor, a bare security, can be charged in equity, they rather prove that it should be discharged, because in none of them has the estate of the obligor who died first been charged, unless he might fairly be considered as a principal, who derived benefit from the money for which the bond was given, thus establishing a distinction between principal and security." *Weaver v. Shryock*, 6 Serg. & R. (Pa.), 266. (Equity principles were always a part of the law of Pennsylvania, administered through common law forms.) Same point. "The obligation between C. & B. to the bank being joint, it cannot be questioned but that at law the obligation at the death of C. survived against B., and the estate of C. became thereby discharged from all liability on account of it. Had C. derived any benefit or advantage by having received the money, or any portion thereof, the bank might then have had a claim in equity, &c. But C. & B. appear to have

derived no advantage whatever from the advancement of the money or creation of the debt, and are therefore in equity as mere sureties; consequently the bank can have no claim, founded upon equitable principles, against the estate of C., after his death, for the payment of the money." *Kennedy v. Carpenter*, 2 Whart., 361, and the cases therein *reviewed. Same point. "A well-considered case," says [*90 C. J. Tilghman, in *Weaver v. Shryock*. The decree of the chancellor, who had granted relief to the obligee against the executor of the deceased obligor, the survivor being insolvent, was reversed in the Court of Appeals of Virginia. *Harrison v. Field's Executors*, 2 Wash. (Va.), 136.

Bearing in mind the distinction in case of joint debts between the principal, who had consideration and advantage, and the estate of a deceased mere surety, who in his lifetime had none, all the cases (with a single exception) are confirmatory of this proposition in principle. Story, Eq., §§ 162, 163, 164, 676; *Primrose v. Bromley*, 1 Atk., 90; *Simpson v. Vaughan*, 2 Atk., 31; *Bishop v. Church*, 2 Ves., 101, 371; *Devaynes v. Noble*, 1 Meriv., 568; *Sumner v. Powell*, 2 Meriv., 36.

See the English cases to the point all well collected in Pitman on Principal and Surety, 91 (Law Lib., Am. ed., 74). The author says, "No case has hitherto occurred where equity has varied the legal effect so as to charge the surety."

An isolated case stands in opposition to all the rest, and it is suggested that it was not well considered at Circuit. The learned judge, in his Commentaries, also says, "If one of the sureties dies, the remedy at law lies only against the surviving parties; but in equity it may be enforced against the representative of the deceased party, and he may be compelled to contribute to the surviving surety, who shall pay the whole debt." *United States v. Cushman*, 2 Sumn., 430, &c.; 1 Story, Eq. Jur., §§ 475, 497.

The Supreme Court of Pennsylvania, in commenting on this passage, say, "In support of this, he (the learned Judge) refers to *Primrose v. Bromley*. By the term 'sureties' here, joint debtors are merely meant, such as had all derived a benefit from the debt, and therefore were bound in equity, on account of the beneficial consideration, while living, to pay it; it could not have been used for the purpose of distinguishing mere sureties from those for whose benefit the debt was created. The authority will not support any other meaning than that now suggested." And so of the authorities relied on in *United States v. Cushman*; all were cases of

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principal debtors. *Kennedy v. Carpenter*, 2 Whart. (Pa.), 364; 1 Atk., 69.

Mr. Justice GRIER delivered the opinion of the Court.

As the decision of one of the points raised in these cases will rule them both, it will be unnecessary to notice the others.

The complainant seeks a remedy in equity against the assets of a deceased surety, in certain bonds given for duties. *91] The *bonds were joint and several, but a joint judgment had been recovered on them against all the obligors. The principal in the bond survives, but is insolvent.

The question for our consideration will, therefore, be, whether a court of equity will interfere to give a remedy against the personal assets of a deceased surety, when the remedy at law has been lost by the election of the obligee to take a joint judgment on a joint and several obligation.

The obligation of suretyship arises only from positive contract. This contract is construed strictly both at law and equity, and the liability of the surety cannot be extended by implication beyond the terms of his contract. If he contracts jointly with his principal, it is a legal consequence known to all the parties, that his personal estate will be discharged in case he should die before his principal. Such being the law, it may be considered as a part of the written condition of the bond. And equity will not interfere to extend the liability, as against his estate, on the ground that such discharge arises from the mere technicalities of the law.

So, where a surety enters into a joint and several obligation with his principal, the obligee and all the parties are supposed to be aware of the doctrines of law connected with such securities, and to incorporate them therein, as part of the contract. The obligee knows that this bond will entitle him to either a joint or several judgment, at his election; he knows also that he cannot have both, that his bond is extinguished by his judgment, or merged in it, as a security of a higher nature, and he knows that, if he elects to take a joint judgment, and neglects to have execution levied in the lifetime of the surety, his personal estate will be discharged at law.

Assuming, as we have a right to do, that these known and established principles of law form a part of the written conditions of the bond, it is not easy to perceive how a chancellor could interpose in the latter case, more than in the former, without disregarding the terms of the contract, and extend-

ing the liability of the surety beyond the letter and spirit of his bond.

It is true that, in cases of fraud, accident, or mistake, equity will relieve as well against the surety as the principal. Thus, in case of a lost bond, equity will set it up against a surety, or where a bond has been made joint, instead of joint and several, by mistake of a scrivener; but it will require a very clear and strong case where a surety is concerned. (3 Russ., 539.) On the contrary, where the parties are joint debtors, and there is no surety in the case, equity will reform the bond, on *the mistake presumed from the fact that [92 both are bound in conscience to pay, and therefore intended to bind themselves severally.

In the present case, we have no allegation of fraud, accident, or mistake. The bill assumes that the legal liability of the surety is gone, by coming into equity for relief, and it shows affirmatively, that the loss of legal recourse to the assets of the surety has resulted from the voluntary election of the obligee to extinguish the several remedy on his bond, without any allegation of mistake or surprise.

"If the obligee of a joint bond by two or more agree with one obligor to release him, and do so, and all the obligors are thereby discharged at law, equity will not afford relief against the legal consequences, although the release was given under a manifest misapprehension of the legal effect of it, in relation to the other obligors." (*Hunt v. Rousmaniere's Adm.*, 1 Pet., 1.)

If equity would not interfere in such a case to revive the legal obligation, even as against the principal debtor thus unwittingly released, it is difficult to perceive on what principle it should interpose to revive an extinguished remedy against a surety who is not bound beyond his legal liability, and who has been discharged therefrom by the voluntary act of the obligee, without any allegation of surprise or misapprehension of the law.

That equity will not hold a surety liable, where he is discharged at law, seems to be well settled both in England and in this country, as a reference to a few of the decisions on this subject will fully show. In *Wright v. Russel*, 3 Wils., 530, it is said, "that courts of equity are favorable to sureties, and where they are not strictly bound at law, equity will not bind them." And in *Simpson v. Field*, 2 Ch. Cas., 22, it was held, "that, where a surety is not bound at law, he will not be made liable in equity." In the case of *Waters v. Riley*, 2 Harr. & G. (Md.), 310, the Court of Appeals of Maryland say, "A surety is bound only by the bond

itself, and is not under a moral obligation to pay; equity will not therefore interfere to charge him beyond his legal liability." The same doctrine is established by the Court of Appeals of Virginia, in *Harrison v. Field's Ex.*, 2 Wash. (Va.), 136, and by the Supreme Court of Pennsylvania, in *Weaver v. Shryrock*, 6 Serg. & R. (Pa.), 206, and *Kennedy v. Carpenter*, 2 Whart. (Pa.), 361.

The only case which asserts a contrary doctrine is that of *United States v. Cushman*, 2 Sumn., 426.

Although, as a Circuit decision, it is not binding in its authority upon this court, yet, proceeding from so eminent a *93] judge, it is entitled to high respect. The case is precisely parallel with the present in all its circumstances, and the positions there assumed have been urged upon the court in this case, as sufficient to entitle the appellant to a decree in his favor. The opinion of the court in that case, and the argument of the learned counsel for appellant in this, are based on the two following propositions, to neither of which is this court prepared to give its assent.

1st. "That when a party enters into a joint and several obligation, he in effect agrees that he will be liable to a joint and a several action for the debt; and if so, then a joint judgment can be no bar to a several suit: that by electing a joint suit, the obligee does not waive his right to maintain a several suit; and that a joint judgment is not *per se* a satisfaction of a joint and several contract."

2d. "That even if the joint judgment could be treated at law as a merger of the several obligations, so far from that constituting a ground in equity to refuse relief against the assets of the deceased party, it furnishes a clear ground for its interference; for it is against conscience, that a party who has severally agreed to pay the whole debt should, by the mere accident of his own death, deprive the creditor of all remedy against his assets."

1st. The first of these propositions proves too much for the case. For if the surety is still liable at law, the complainant has made no case for relief in equity. But the cases cited in support of it, viz. *Higgen's case*, 6 Co., 44, and *Lechmere v. Fletcher*, 1 Crompt. & M., 623, will not sustain the doctrine stated in this proposition. They establish this position and nothing more, viz.:—"That, in case of a joint bond, a judgment against one joint contractor would be a bar to an action against another; but if two are bound jointly and severally, and the obligee has judgment against one of them, he may yet sue the other." The case of *Sheehy v. Mandeville*, 6 Cranch, 253, in this court, although sometimes criti-

cised and doubted in other courts, goes no farther than to decide, that, where one partner is sued severally on a joint or partnership contract, and judgment obtained against him, it is no bar to a suit against the other, because this contract was not merged in the judgment, and because the first judgment was founded on a several, not a joint, promise.

But these cases give no countenance to the assertion, "that a joint judgment is not *per se* a satisfaction of a joint and several bond." The law on this subject is too well settled to admit of a doubt, or require the citation of authorities, that, if two *or more are bound jointly and severally, the obligee may elect to sue them jointly or [*94 severally. But having once made his election and obtained a joint judgment, his bond is merged in the judgment, *quia transit in rem judicatam*. It is essential to the idea of election that a party cannot have both. One judgment against all or each of the obligors is a satisfaction and extinguishment of the bond. It no longer exists as a security, being superseded, merged, and extinguished in the judgment, which is a security of a higher nature. The creditor has no longer a remedy, either at law or in equity, on his bond, but only on his judgment. The obligor is no longer bound by the bond; but by the judgment, it has become the evidence of his indebtedness, and the measure of his liability.

2d. The second proposition repudiates the doctrine of courts of equity, that, where a surety is not bound at law, he will not be made liable in equity. It does not controvert the well settled principle, that, where the bond is joint only, the personal assets of the surety will be discharged by his death, but asserts that his conscience is affected because his bond was originally both joint and several. But if it is not against conscience that the estate of a surety should be released by his death, when his undertaking was originally joint only, it is hard to apprehend how it becomes so, when the obligee, having a choice of both securities, elects to hold the security bound jointly, and not severally.

If a surety is under no moral obligation to pay, where he is not legally bound by his contract, his conscience cannot be reached, when the law discharges him from his obligation. The law, as we have before stated, makes a part of every contract; and in case of a joint and several bond, the contract of the parties is, that the estate of the surety shall be discharged by his death, if the obligee elect to hold him jointly, and not severally, liable. So that, in the present case, it is the obligee who is acting against conscience, because he seeks to hold the surety liable, contrary to their contract.

"No case can be found in the books," says a learned author, (Pitm. Pr. & S., p 92, n.,) "where equity has varied the legal effect to the instrument so as to charge the surety." To give a remedy against the estate of a surety after it is discharged at law, and by the election of the obligee, would be varying the legal effect of his contract in a most material point.

The cases cited in support of the second proposition will be found on examination to have no bearing on the point now under consideration. They are too numerous to be severally *95] *noticed. They may all be found collected in 1 Story, Eq., § 162, in note, commencing with *Simpson v. Vaughan*, 1 Atk., 81, and ending with *Thorpe v. Jackson*, 2 Younge & Coll., 562, and *Wilkinson v. Henderson*, 1 Myl. & K., 582. They chiefly refer to cases of partnership, and other joint debtors whose liability at law is joint only, but equity administers relief as against the estate of the deceased partner or joint debtor on account of the moral obligation of each to pay the debt, and because they have received a benefit from the transaction. The doctrine of these cases is clearly stated by Sir William Grant in the case of *Sumner v. Powell*, 2 Meriv., 35. "Where," says he, "the obligation exists only in virtue of the covenant, its extent can be measured only by the words in which it is conceived. A partnership debt has been treated in equity as the several debt of each partner, though at law it is only the joint debt of all. But there all the partners have had a benefit from the money advanced or the credit given, and the obligation of all to pay exists independently of any instrument by which the debt may have been secured; so, where a joint bond has been in equity considered as several, there has been a credit given to the different persons who have entered into the obligation. It is not the bond that first created the liability."

"It is for this reason," says Mr. Justice Story (Eq. Jur., § 164), "that equity will not reform a joint bond against a mere surety so as to make it several against him, on the presumption of a mistake from the nature of the transaction."

When an obligee takes a joint and several bond, he has nothing to ask of equity; his remedy is wholly at law. If he elects to take a joint judgment, he voluntarily repudiates the several contract, and is certainly in no better situation than if he had originally taken a joint security only; equity gives relief, not on the bond, for that is complete at law, but on the moral obligation antecedent to the bond, when the creditor could have had no remedy at law.

An obligee who has a joint and several bond, and elects to treat it as joint, may sometimes act unwisely in so doing, but his want of prudence is no sufficient plea for the interposition of a chancellor. Nor can the conscience of a mere security be affected, who, having tendered to the obligee his choice of holding him jointly or severally liable, has been released at law by the exercise of such election.

The decree of the Circuit Court is, therefore, affirmed.

*Mr. Justice McLEAN and Mr. Justice WOOD-
BURY dissented. [*96

Mr. Justice WOODBURY.

The leading question in this case is, whether, after the recovery of a joint judgment on a joint and several bond, and the death of one of the obligors happening, who was a surety, a court of equity will sustain a remedy against his property in the hands of his executor.

The safety of the government, having such numerous sureties on official bonds, depends so much on their liability in all proper cases, that the technical discharge of them on objections not reaching the merits is a great and growing evil. The public, too, in the individual dealings of many on the strength of the security furnished by others than the principal debtor, have a deep interest in preventing their discharge without a full satisfaction of the debt.

I must be excused, then, for stating some of the reasons and authorities why it is not in my power to concur in the judgment just pronounced, discharging the executor of the surety to the government, without making any payment whatever of the debt. It is conceded by me, that, in case of a debt entirely joint, if one of the obligors die, it is a rule in a court of law, that "his executor is totally discharged, and the survivor or survivors only chargeable." 2 How., 78; 2 Sumn., 368; Bac. Abr., *Obligations*, D. 3; *Erwin v. Dundas*, 4 How., 78; 2 Whart. (Pa.), 361, in *Kennedy v. Carpenter*, and cases cited there; 2 Harr. & G. (Md.), 313; *Rogers v. Danvers*, 1 Mod., 165; 1 Freem., 127. This, however, is the rule at law, and is not, in all cases, the same in equity. Even at law, the objection is purely technical, and arises only on account of the want of a remedy there against the estate of the deceased, and not because the debt itself has been satisfied; and so strong is the justice of still enforcing it at law without a resort to equity, that the statutes of many States have expressly made provision for collecting a debt against the estate of all joint debtors when it has never yet been paid by

either. See *United States v. Cushman*, 2 Sumn., 312, and 2 Gill & J. (Md.), 316. But in time, without any statute, courts of chancery gave relief in this class of joint contracts by allowing a remedy in certain instances; and though this was at first refused (2 Bro. Ch., 276), and was granted at last with some hesitancy, it has become the ordinary practice to allow it, when the original indebtedness or liability, though now in form joint, was on any account, or in any just view, general no less than joint.

*97] Indeed, without relying on this distinction, the Lord Chancellor in *Primrose v. Bromley*, 1 Atk., 90, states a case where he decreed such relief, to a certain extent, on a joint bond against the estate of the deceased. He observes,—“There was a case which I determined in this court, where there were two persons jointly bound in a bond, one of the obligors died; and to be sure, at law, it might have been put in suit against the survivor, but as I thought it extremely hard, I decreed the representative of the co-obligor should be charged *pari passu* with the surviving obligor in the payment of the bond.”

But it seems uniform to grant such relief by a new remedy in chancery against the estate of the deceased, whenever, as here, the original contract was several as well as joint. *Towers v. Moor*, 2 Vern., 99; 1 Pet., 16, and cases *post*; *Rogers v. Danvers*, 1 Mod., 165; Burr., 1190; W. on Ex., 809, 811; 1 Freem., 127. I doubt whether a single case to the contrary exists in either the American or the English books.

One ground of relief, where the original contract was several no less than joint, is the admission in the undertaking, that each signer and his estate should be separately liable for the whole to the obligee, so far as regards him, and hence raising in equity a liability to do this separately by his property after death, because the difficulty in any remedy to enforce it at law is merely technical, and the equity or conscience in paying an unsatisfied promise and debt stands still unimpaired. See further cases. *United States v. Cushman*, 2 Sumn., 427; 1 Meriv., 563; *Sumner v. Powell*, 2 Meriv., 30; *Devaynes v. Noble*, 2 Russ. & M., 506. The chief difficulty in this class of cases is to settle whether the contract was several as well as joint. It is the language of the contract, when several, which is the most decisive test as to its severalty. Sir Wm. Grant says, “When the obligation exists only by virtue of the covenant, its extent can be measured only by the words in which it is conceived.” 2 Meriv., 36. A similar reliance on the words used being joint only, and

not several, appears in *Harrison v. Field*, 2 Wash. (Va.), 141.

The court observes, too, in *Sumner v. Powell*, 1 Turn. & Russ., 425, "There can be no doubt in the world, that, if this covenant had been a joint and several covenant, it would have done, and therefore any evil which might otherwise arise out of the case may be avoided by the addition of a single word." In *Towers v. Moor*, 2 Vern., 99, it is said, "Where two are jointly bound, and one dies, you must sue the survivor, and *cannot maintain an action against the executor or administrator of him that is dead; but if bound jointly [*98 and severally, it is otherwise."

So in *Lechmere v. Fletcher*, 1 Crompt. & M., 629, there had been a contract wholly joint, and a judgment on it jointly; but one of the promisors made also a several agreement to pay the amount, not as a substitute, but as an additional undertaking; and a remedy in equity against the representative of this last promisor was sustained on that separate agreement.

But without pursuing this point further, it is placed beyond doubt, by the numerous cases hereafter cited, that courts of equity will give relief, though the contract produced is on its face joint, if it be proved that it was originally agreed to be joint and several, and by mistake or ignorance was written joint alone. It becomes necessary, then, to consider next the only pretence urged for taking this case out of the general rule, namely, that a joint judgment had been subsequently recovered here against all the obligors, and that the deceased was a surety.

1st. It has been much pressed here that the remedy in this case is now at law only on the joint judgment, and hence should not be enforced severally in equity. But it is conceded that the original liability was joint and several; and it is laid down in some books, that a several action at law could probably have been sustained here on the original demand, after the joint judgment.

It has been adjudged by this court, that on a joint and several promissory note an action and judgment against the signers severally are no bar to a joint action against them. *Sheehy v. Manderville*, 6 Cranch, 253; 6 Co., 44; 13 Mass., 148. And though a joint suit on a joint and several promise is a bar to another joint action on it (*Higgins's case*, 6 Co., 45; *Gilman v. Rives*, 10 Pet., 298), it is thought by Judge Story, after much deliberation and research, to be no bar to a several suit and judgment afterwards on the original joint and several promise. *United States v. Cushman*, 2 Sumn., 312, *semb.*, and

 The United States v. Price.

427; 1 Story, Eq. Jur., § 164 and note, and § 676; 7 Serg. & R. (Pa.), 355; *Lechmere v. Fletcher*, 1 Crompt. & M., 623. *Sed cited contra*, 13 Serg. & R. (Pa.), 288; 2 Watts (Pa.), 204; 7 Serg. & R. (Pa.), 280; 9 Watts & S. (Pa.), 88; *United States v. Thompson*, 1 Gilp., 622; 1 Pet., 16; 2 Wash. (Va.), 136.

On an examination of the opposing cases which have been *99] cited, it will be seen that the weight of authority is *against the technical merger or bar set up here by the joint judgment.

The case cited from Gilpin against this is one at law; and the point in controversy was merely the validity of a release to one co-obligor, after a judgment against another, to discharge the latter also.

The case of *Williams et al. v. McFall*, 2 Serg. & R. (Pa.), 280-282, is only sustaining a judgment separately against one co-obligor, who confessed it.

The case in 1 Pet., 16, merely held one obligee to abide by the selection he had made of one kind of security over another, given by a single obligor.

The case in 2 Wash. (Va.), 136, was one of a joint contract originally, no less than afterwards.

The case of *Reed v. Garvin's Executors*, 7 Serg. & R. (Pa.), 354, held, to be sure, that one joint judgment was a bar to another at law against the executors of one of the obligors deceased. Yet, at the same time, it maintained that a remedy existed against the real property, if not the personal, of the deceased, and at law, in Pennsylvania, wherever it existed in England in chancery (pp. 356, 357, 365). Duncan, J., at this last page, says, what strongly applies here, though after a joint judgment on the bond against all the obligors,—“That in some way the defendants, the executors of the deceased obligor, should be reached, or the lands of the testator, which are assets in his hands,” and charged with the payment of judgment debts, “we all agree, though we differ in the mode.”

The case of *Downey v. The Farmers and Mechanics' Bank*, 13 Serg. & R. (Pa.), 288, is the only case cited which holds that after an action at law against two co-obligors, though judgment be obtained only against one, another suit separately will not lie against the other. But this was deemed by the court as illiberal and technical in principle, and applied only to another proceeding at law against one.

There is another case—*Ex parte Rowlandson*, 3 P. Wms., 406—which has not been cited, but holds, as a collateral point or illustration, that a suit against all obligors instituted on a

joint and several contract at law may, while pending, be pleaded in abatement to a several suit on the same contract, and *vice versa*. No decided case of this kind is cited, however, and this is not in all respects in point.

Nor is it in point that a joint judgment against two, apparently on a promise wholly joint, is a bar to a subsequent action at law against one of them, without averring the death or discharge of the other (see *Gilman v. Rives*, 10 Pet., 298), because the present promise was not joint alone.

*In no instance in this class of cases has it ever been [*100 held necessary, in order to sustain this proceeding in equity, that a judgment on the original indebtedness should be severally recovered first. See *post*. 1 Meriv., 539. Or that, if joint, it should be still open to a several remedy at law.

Thus stands this point on the precedents. It will be apparent, therefore, that when this is a mere technical objection as to a remedy, and not any defence against the debt as still due, and is a very doubtful one at law on the present facts, it ought not to prevail a moment in a court of equity.

It is not to be overlooked that our present inquiries are not at law, but wholly in equity, and are to be governed by equitable, and not strict legal or technical considerations. If, then, the joint judgment had been more clearly a technical merger of the joint and several debt here, and no several action would afterwards lie at law on the note, would it not be just and right on principle to grant this separate aid in chancery? So strong is this principle, we have already seen, that sometimes it is provided by express legislation that at law a suit may still be prosecuted against the surviving debtor and the executor of the deceased debtor together on a joint obligation, or, if existing in a judgment, be enforced against the property of either. (See Sumner, and Harris & Gill, before cited.) The justice of such a remedy, the debt against both being conceded still to exist unpaid, seems to be so apparent, as to commend its sanction and success in a court of equity without the aid of any statutory provision. 1 Story, Eq. Jur., § 164.

One reason why the assets in the hands of the executor are charged in any of these cases is, that he is a trustee for all which can equitably be charged on them. 2 Williams on Executors, 1584. But was not the estate of the deceased charged equitably with a joint judgment against him on a joint and several promise, as fully as by that promise without any judgment?

One prominent reason assigned against this relief here,

under all the circumstances of the case, has been, that, by the joint judgment, there has been a release or *quasi* release of each obligor. But this cannot mean a release of the debt, or the joint judgment itself could not be enforced at all in any way, nor against either. So far from the debt itself being released, it is fixed and proved by a solemn record. Notwithstanding, too, the subsequent death of one, the debt still stands. He has never paid it, and his property, in every conscientious view, should also stand as liable as ever to discharge it, the obstacle at law reaching merely the remedy.

The obligation on the estate to pay *in foro conscientiae* being *101] *strong as ever, the moral duty on the representative of the deceased is still imperative, and is more to be weighed and enforced in chancery than elsewhere, that being the tribunal peculiarly designed to relieve against much of the strictness and technicality prevailing elsewhere.

It has been urged, further, that, if the liability is enforced here in chancery, it will be without any equity existing between the obligors. But that is not the question; it is, whether there was not an equity between the obligors and the obligee,—one growing out of an absolute promise, an ample consideration both implied and hereafter shown, and in this case a judgment recovered. An executor is charged sometimes where a judgment has been recovered against the deceased, when he would not be if there had been no such judgment, as the cause of action at times does not survive.

Whiteacres v. Onsley, Dyer, 322, *a*; 2 Wms. on Exrs., 1366.

Again, it is urged that, the joint judgment being a merger of the joint and several contract, and a several remedy at law afterwards not allowed, there is no ground in equity, because none at law exists to charge the several estate of one deceased. But this proves too much. The principle in all these cases is not to discharge one in equity, if not liable to a suit severally at law, but almost the reverse; because in all cases, except where the contract on its face and in terms was several, no several suit at law can be maintained. But still a proceeding is frequently sustained in equity, and the circumstance of there being no relief at law is one reason for rather than against it. Thus it is with a partnership debt, a common joint debt on a joint loan and bond, and a joint contract or bond not reformed, but which should have been written several. In none of these could a several suit at law lie when the co-obligor died, and yet in all a court of chancery will relieve. Those in each class have been or will hereafter be explained, and need not be repeated.

Again, on equitable grounds, it seems obvious that after a

joint judgment against joint and several obligors, which binds still the person and property of either as much as if the judgment had been several, the property of each should continue liable as much as if the contract had been never sued, or had been sued severally. And *a fortiori* should this be the case in equity, where judgments form a lien on the property of all the respondents, and a joint judgment, as here, bound the estate of the deceased co-obligor. I am not aware of any case like this, even if it had been entirely joint in form, that equity would not pursue such a lien against ali.

*Again, supposing that a several action would not lie here on the bond against one co-obligor after a [*102 joint judgment, though the promise was joint *and* several, rather than joint *or* several, or joint alone, it is far from decisive against this application in equity. There the court often looks to the circumstance whether the *original* contract of indebtedness was joint alone, or joint and several, and if the latter will aid a recovery.

So paramount is this test, that where the written contract reads joint only, equity will on request reform it, if it was originally agreed to be several, and by mistake or fraud was not so written; and after reforming it, chancery will enforce it against the estate of one co-obligor deceased, as it was supposed to stand originally. 1 Story, Eq. Jur., § 164.

Other cases seem to imply that an original indebtedness, though the bond be only joint, and no evidence offered of an agreement that it should be several also, will be regarded as several, and enforced accordingly, if it was for an ordinary loan, where all are partners or where all were benefited. See *post*; 1 Story, Eq. Jur., §§ 162, 676; 2 Russ., 196; 2 Meriv., 36.

A fortiori will relief, then, be proper, if it was, as here, originally written several, or even if it was agreed to be so. 2 Ves. Sr., 101, 106; *Ex parte* Symonds, 1 Cox, Ch., 200. Indeed, the justice of this has seemed so strong, that some legislatures, as in Maryland, have gone so far as expressly to enact that the same remedies shall be sustained on joint bonds against estates of one deceased, as on those joint and several. See Act of 1811, ch. 161, in 2 Gill & J. (Md.), 316; 7 Harr. & J. (Md.), 466.

That I am right as to the practice in equity to look to the original contract, and not merely the face of the present debt, may be seen in the cases of partners and of ordinary joint contracts, where it is allowed to be proved that originally, in their essence, though not in form, they were several no less

than joint, and after that to grant relief. See the illustration in *Hunt v. Rousmaniere's Adm.*, 1 Pet., 16, and cases hereafter cited.

It is a peculiar excellence in chancery, on many occasions, that it goes behind writings, and even sealed instruments and judgments, to ascertain how the original transaction stood, and what were its true obligations, in order to enforce them. The joint judgment here did not create the original liability to pay, and hence equity can as properly go back of it to see what the original liability was, and if several no less than joint; as it goes back of a joint bond when "it was not the *103] bond *which first created the liability to pay." 2 Wms. on Exrs., 1370.

However, then, it may be at law as to the several liability of a joint and several contractor, after a joint judgment has been recovered, it seems that the principle and precedents in equity do not rest on that, but hold the estate of one after his death responsible, if the original obligation was several as well as joint. Here the promise and duties were at first not only several, and have never been satisfied, and, except technically at law in respect to the remedy, have never been extinguished; but to the original equities have been superadded a lien on his estate, by the joint judgment recovered before his death, and which it is equitable to have enforced after his death, on this no less than several other occasions.

There are two classes of cases which go to sustain further this view, where the contract is on its face joint, and not in form several as well as joint, and is not proved to have been originally agreed to be written several as well as joint; and yet where relief can be had, looking to the original severalty of the transaction, rather than to the mere technical law on it as now standing. One is where the obligors acted as partners in business, and there, though the promise is in form only joint, a court of equity will charge the estate of the deceased partner in a bill against the executor or administrator. 1 Story, Eq. Jur., §§ 676, 163; *Thomas's case*, 3 Ves., 399; 1 Meriv., 539; *Devaynes v. Noble*, 2 Russ. & M., 495, 506; *Bishop v. Church*, 2 Ves. Sr., 101, 371. This is also said to proceed on general principles of equity rather than on the *lex mercatoria*. 1 Meriv., 539, 562; 2 Younge & Col., 562. It goes back for a test to the original consideration and relation of the parties. So fully, however, even there, is the relief granted on the ground or theory of a several obligation or duty originally, though not so expressed in the writing, that the Master of the Rolls declares, in *Henderson v. Wilkinson* (1 Myl. & K., 588),—"All the authorities estab-

lish, that, in the consideration of a court of equity, a partnership debt as several as well as joint."

The other class is, that in a joint loan or other transaction, if the obligation taken be in terms joint only, and not agreed in the writing or otherwise to be several, equity will still enforce it in many cases against the estate of either alone. 2 Meriv., 37; *Thompson v. Jackson*, 2 Younge & Col., 553; *Cowell v. Sikes*, 2 Russ., 196; *Ex parte Kendall*, 17 Ves., 525, n.; *Waters v. Riley*, 2 Har. & G. (Md.), 310-313; 6 Serg. & R. (Pa.), 226; *Primrose v. Bromley*, 1 Atk., 89; *Kennedy v. Carpenter*, 2 *Whart. (Pa.), 364, 365; 1 Myl. & K., [*104 582; *Simpson v. Vaughan*, 2 Atk., 32; *Bishop v. Church*, 2 Ves. Sr., 101. Here, also, the idea of a several obligation originally is still looked to, and is sought outside of or behind the joint instrument, by examining the transaction as it took place at first.

Some rest the remedy here on the presumed receipt originally by each of a part of the loan or benefit; and others on the legal presumption, not the proved fact, that the contract itself was by mistake originally not written several as well as joint, and thus reforming it and deciding on it as if reformed and made several. See cases before cited, and *Hunt v. Rousmaniere's Adm.*, 1 Pet., 16. And others put it on the probable legal intent, that all should be severally held responsible. 6 Serg. & R. (Pa.), 261; 9 Ves., 118. And this intent is the presumption in all mercantile transactions,—more obviously from usage there,—but is not confined to them. 1 Russ., 191; 2 Younge & Col., 562; *Rawstone v. Parr*, 3 Russ., 427; *Ex parte Kendall*, 17 Ves., 528, n. So strong is this equity regarded against the estate of one deceased, in either of these classes, that chancery will allow it to be pursued without a resort first to the survivor. *Wilkinson v. Henderson*, 1 Myl. & K., 588; *Sleech's case*, 1 Meriv., 539, and 3 Meriv., 593.

The reliance just referred to, on legal presumptions and probable intents originally, in order to find an original severalty in the case to help furnish or justify a remedy in equity, discloses another and the last ground I shall consider in favor of such a remedy here. It is this.

If such presumptions will be made in point of law, as to the intent, and an error in the writing, so as to raise a several engagement originally, to charge the estate of one deceased, the reason for them here is much stronger, as here the original contract was expressed on its face to be several. We are not compelled to resort to mere constructions and inferences to show it to be several. And if equity will in these cases

overcome the technical objection at law which prevents a proceeding there against the estate of one deceased obligor, when the contract is on its face joint, so may it equally well overcome the technical objection at law, when the judgment is on its face joint.

Indeed, as before suggested, the equities in favor of this redress in all cases of joint contracts, and independent of statutory provision, are nearly as strong as in those joint and several,—and quite as strong in case of joint judgments, as these last generally constitute an actual lien on the estate of each obligor.

*105] *2d. No ground remains for claiming an exemption of the estate of Archer from this liability in equity, unless it be that he was a *surety* in the bond. But if a surety promise severally as well as jointly, he seems as liable in equity on account of that written and express promise as a principal would be. And it is on that several promise he is here chargeable in the first instance.

If it was necessary to show some original consideration, in connection with the surety in such matters, the signers of a joint and several bond are as to the obligee usually to be regarded as all principals. 2 Sumn., 427; 6 Johns. (N. Y.) Ch., 309; *Boddam's case*, 9 Ves., 465; 1 Story, Eq., § 496.

It has been adjudged by this court, that the consideration to charge the principal is good to charge the surety. Thus, in *The United States v. Linn et al.*, 15 Pet., 290, it is said,—“If Linn received a sufficient consideration to uphold the promise on his part, it was sufficient to bind the sureties. There was no necessity for any consideration passing directly between the plaintiffs and the sureties. It was one entire and original transaction, and the consideration which supported the contract of Linn supported that of his sureties.” (p. 314.)

Beside this, unless the obligee injures them by a new stipulation for further delay with the principal, which is not attempted to be proved here, and when here the delay benefited the surety alone, the principal being insolvent, then it will be seen that other good reasons usually exist for him to consider them as principals, and as promising for a good and valuable consideration to pay the sum named in the bond, and thus to raise a strong equity against them. Such a consideration, when they are liable by a sealed instrument, is in law always presumed or implied. 6 Johns. (N. Y.) Ch., 302; 1 Vern., 427; 1 Ves. Sr., 514; 15 Pet., 291.

It is the usage, also, for sureties to be previously indemnified by a pledge of actual property of some kind, or to

receive in money in advance two or more per cent. for their guarantee. It is to be recollected, also, that here the imported goods were, in consequence of their promise, allowed to be sold in this country by the owner with no other payment of duties, and thus a most important pecuniary benefit conferred on their friend for their promise as sureties.

One of Lord Bacon's proposed improvements in chancery was to treat sureties as justice and the law required, and their own conduct warranted; they, being anxious to obtain favors for friends or themselves by their promises, should therefore be made equally anxious to fulfil those promises. See 6 *Johns. (N. Y.) Ch., 309, a like view. The [*106 surety is also often the most responsible signer, and without whom the credit would not generally have been given.

An idea seems to have been entertained here, that chancery will do nothing to charge a surety which cannot be done at law, or when he is technically exonerated at law. But this is an error. It will often extend like relief against them as fully as against principals. Thus, passing by the cases, that a surety will still be made liable in equity though the bond is lost, as this may be done at law, (*Skip v. Huey et al.*, 3 Atk., 93; 6 Johns. (N. Y.) Ch., 307; 1 Ch. Cas., 77; *Boddam's case*, 9 Ves., 464; *Equity Cases*, Abr., 98; 2 Wash. (Va.), 140,) yet, in chancery, a contract will be reformed against a surety as well as a principal, where it is proved clearly that his name was by mistake omitted in the body of the instrument, though this will not be done at law. (*Crosby v. Middleton*, Prec. in Ch., 309.) So where, by mistake, the bond runs to the wrong person. (*Wiser v. Blachly*, 1 Johns. (N. Y.) Ch., 607.) There are several cases, too, where in equity, but not at law, a bond only joint on its face will be reformed against a surety, and made several also, if it was proved to be originally agreed to be several. 1 Story, Equity, § 164, and cases there; see cases before cited, and 3 Russ., 424, 539; *Weaver v. Shryrock*, 6 Serg. & R. (Pa.), 262-265. And to go to the full extent of the present case, it has been deliberately settled, that relief in equity to charge the estate of a deceased surety will be given as fully as against the principal, when the bond is on its face expressed to be joint and several. 6 Johns. (N. Y.) Ch., 309; *Rawstone v. Parr*, 3 Russ., 427 and 539, *semb.*; *Wiser v. Blachly*, 1 Johns. (N. Y.) Ch., 609; Prec. in Ch., 309; *United States v.ushman*, 2 Sumn., 427.

In this class of cases, also, the relief is made to rest on the

express form of the bond or contract being several as well as joint, and not on any joint benefit or partnership.

These last are distinct and different grounds to charge either principals or sureties, when contracts are on the face of them joint. See Pitman, Prin. & S., 91, note 1. So in *Rawstone v. Parr*, 3 Russ., 427, and 589, S. C., it was held that, though the present contract appeared to be only joint, if it was agreed originally to be joint and several, as it was in truth here, a court of equity would aid a recovery against the executor even of a surety. Prec. in Ch., 309; 1 Story, Eq., § 164; 1 Johns. (N. Y.) Ch., 609. *Sed cited contra*, *Waters v. Riley*, 2 Har. & G. (Md.), 310; 6 Serg. & R. (Pa.), 246, *semb.*; *Kennedy v. Carpenter*, 2 Whart. (Pa.). *107] 361. But, as already shown, *these last were all cases of joint contracts, and not agreed to be several also; and cases where, likewise, no consideration was supposed to exist affecting the surety

In 6 Serg. & R. (Pa.), 266, the court admit that cases may exist where the estate of a co-surety may be charged, and one of them is where it was originally agreed the bond should be several (p. 264). We have already cited a number of others to that effect, and consider this an authority for our proposition.

The case of *Harrison's Executors v. Field's Executors*, 2 Wash. (Va.), 136, is often cited against the position I have taken. But it was confessedly a joint bond, and there was no evidence of an original agreement to have it several (p. 138). And Judge Roane (p. 139) makes the same admission, that cases may exist where the estate of a co-surety is liable.

All the doctrines in Pitman on Principal and Surety, 90 and 91, supposed to differ from this position, are cases where the written contract is joint, and not joint and several.

Obscurity arises in some of the cases amidst these distinctions, from their subtilty and variety, and this tends to mislead unless cautious discrimination is made. This, and the collision between a few of the cases in the books, sometimes spring from the circumstance of not adverting to the ground, that all the signers are principals as to the obligee; and that sureties are as to him to be made liable, as if principals. See this error in *Waters v. Riley*, 2 Har. & G. (Md.), 310. And from not discriminating between cases where the written obligation was only joint, and where it was both joint and several. 3 Russ., 541. So, from not observing that the surety is estopped as to the receipt of a consideration in a sealed instrument, and more especially, as here, after a judgment against him and the principal.

Another cause of some confusion and mistake in some of the cases is the treating of them as if still at law, and on strict legal principles, rather than in equity and on equitable grounds.

It is another source of error that several cases rest on more than one ground. Thus, in *Primrose v. Bromley*, 1 Atk., 90, the obligation was several as well as joint, and a benefit or consideration extending to the co-obligor deceased. So in *Simpson v. Vaughan's Executors*, 2 Atk., 33, the court first reformed the contract, being a mercantile loan, so as to regard it as several no less than joint, and a full consideration to the deceased was apparent.

Here one ground exists, which is sufficient alone, namely, a written obligation several as well as joint; though, were it necessary to show a consideration also, reaching the surety, *enough to raise a legal and strong presumption of one is not difficult to be pointed out, as before done, and [*108 explained.

In conclusion it may be useful, as a test of the real equity of the principle adopted by the court in this case, to examine for a moment and discriminate what is its character or extent. It is this. An original obligation, joint and several, after the death of one obligor, who was a surety, may equitably be enforced against his estate, if not sued at all, but cannot be equitably enforced against it if sued jointly, and the liability of all rendered more certain, and a lien against the estates of all fixed by the judgment recovered.

Again, if an obligee sues each obligor separately, on a joint and several bond, before the death of either, it holds him entitled to relief against the estate of the deceased; but if he sues all together, he is not equitably to be relieved. In both cases, the original contract was the same in form and substance, the consideration the same, the liens the same: and as to the deceased, the same in amount after, as well as before, judgment; and in both cases the debt itself is still unpaid and still unreleased, and no remedy open at law against the estate. Yet it seems, in an equitable view,—in a court whose duty and business it is generally to adopt an enlarged, liberal, and just policy, and to aid against the strictness and technicalities of law,—one of these cases is to be deemed entitled to its beneficent interference, but the other is not.

Again, as a consequence of this doctrine, all joint obligors will of course hereafter be burdened with much increased cost, instead of being aided by any principle in their favor really settled by the court in this judgment. Because all the

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ameliorating principle settled here is, that, if each obligee is sued severally on a joint and several obligation, the obligor is entitled to the aid of a court of equity against the estate of one deceased; but if he brings only one action, and makes but one bill of cost against all of them, he behaves so as to be entitled to no equitable relief. Certainly this looks like a new attitude or version of what in a court of equity should be considered equitable; and it is likely to prove much more beneficial to the profession, than to the parties concerned or the public. Whatever technical differences as to remedies may be created at law by the forms of judgments, it will be difficult in equity, and applying equitable principles, as in the present case, to discriminate against the present case on the merits and on grounds of substantial justice.

The plaintiffs, therefore, seem to me entitled to recover, out of the estate of the deceased, the balance which is due.

*109]

*ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Pennsylvania, and was argued by counsel. On consideration whereof, it is now here ordered and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, affirmed.

JAMES G. WILSON, APPELLANT, v. ANDREW P. SIMPSON,
E. E. SIMPSON, JOSEPH FORSYTH, AND BAGDAD MILLS.

The documents showing the title to Woodworth's planing-machine are set forth *in extenso* in 4 How., 647, *et seq.*

The assignment from Woodworth and Strong to Toogood, Halstead, and Tyack (4 How., 655) declared not to have been fraudulently obtained according to the evidence in this case.

An assignee of Woodworth's planing-machine, having a right, under the decision in 4 How., to continue the use of the patented machine, has a right to replace new cutters or knives for those which are worn out.

The difference explained between repairing and reconstructing a machine.¹

THIS was an appeal from the Circuit Court of the United States for Louisiana.

¹ COMMENTED ON. *Ind. v. Union mons*, 16 Otto, 94. CITED. *Gottfried India Rubber Co.*, 3 Blatchf., 491. *v. Conrad Seipp Brewing Co.*, 10 Biss., DISTINGUISHED. *Cotton tie Co. v. Sim-* 370; s. c., 8 Fed. Rep., 323.

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It was a continuation of the case of *Simpson et al. v. Wilson*, reported in 4 How., 710, where a statement of the case is given, which need not be here repeated. All the documents relating to the patent and transfer of Woodworth's planing-machine are set forth *in extenso* in the case of *Wilson v. Rousseau et al.*, 4 How., 647, *et seq.*

The report of the case in 4 Howard shows that the two following questions were certified to this court, viz. :—

"1. Whether, by law, the extension and renewal of the said patent granted to William Woodworth, and obtained by William W. Woodworth, his executor, inured to the benefit of the said defendant, to the extent that said defendant was interested in said patent before such renewal and extension.

"2. Whether, by law, the assignment of an exclusive right to the defendant, by the original patentee or those claiming under him, to use said machine, and to vend the same to others for use, within the county of Escambia, in the Territory of West Florida, did authorize said defendant to vend elsewhere than in said county of Escambia, to wit, in the city of New Orleans, State of Louisiana, plank, boards, and other materials, products *of a machine established [*110 and used within the said County of Escambia, in the Territory of West Florida."

On the 18th of April, 1846, the decisions of the Supreme Court in these questions were certified to the Circuit Court, as follows :—

"1. That, by law, the extension and renewal of the said patent granted to William Woodworth, and obtained by William W. Woodworth, his executor, did not inure to the benefit of said defendant to the extent that said defendant was interested in said patent before such renewal and extension. But the law secured to persons in the use of machines at the time the extension takes effect the right to continue the use of the same.

"2. That an assignment of an exclusive right to use a machine, and to vend the same to others for use, within the specified territory, does authorize an assignee to vend elsewhere, out of the said territory, plank, boards, and other materials, the product of such machine."

Thereupon, leave was granted by the Circuit Court to the defendant, Forsyth, to amend his plea, and to the complainant to amend his bill.

And thereupon the complainant amended his bill,—

1. By charging that the mutual deed between Woodworth and Strong of the one part, and the assignees of Emmons's patent (before mentioned), was procured by the latter by

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fraud upon Woodworth and Strong, not discovered until the extension of the patent.

2. That the defendants had put in operation one new machine since the extension of the patent of 1842 took effect, and that they had rebuilt, by the addition of new parts, being substantial parts of Woodworth's invention, the old machines which they had in actual use at the expiration of the first term of the patent, so that they were practically no longer the same machine; and thus that the use of those machines, under the color of machines which had been in actual use at the expiration of that term, was a fraud upon the law.

Issue was joined upon these new matters. Evidence was taken upon them, as well as upon the question of the extent of infringement.

It is not necessary to insert this evidence, because the substance of it is stated in the opinion of the court.

On the 4th of May, 1849, the cause came on to be heard before the Circuit Court, upon the bill, answers, replication, exhibits, and evidence, when the court decreed that the bill should be dismissed.

The complainant appealed to this court.

*111] *The cause was argued by *Mr. Seward* and *Mr. Webster*, for the appellant, and by *Mr. Gilpin* and *Mr. Westcott*, for the appellees.

The counsel for the complainant contended,—

1. That the mutual deed executed by and between William Woodworth, James Strong, and William Tyack, D. H. Toogood, Daniel Halstead, and Uri Emmons, was procured from the said Woodworth and Strong by fraud, and is therefore void; and that this fraud vitiates and avoids the defendants' title or right to the use of Woodworth's invention.

2. That the defendants' machines are used in fraud of the law, and in violation of the complainant's rights.

In support of the first proposition it was urged, that Woodworth was the inventor of the machine, which was of great value, and that the consideration which was received by Woodworth and Strong in the mutual deed, viz. that of receiving an assignment of Emmons's rights, was of no value whatever, because Emmons had no rights to convey; and that this was an intentional fraud upon Woodworth and Strong, practised by Toogood, Halstead, and Tyack. It was also urged, that the fraud thus established vitiated and avoided the claim of the defendants, because the mutual deed secures no part of the franchises of the extended term to as-

signees of the first term. Whatever they have is derived only from the proviso in the eighteenth section of the act of July 4, 1836. Those claiming the benefit of the extension must be lawfully possessed of the right at the close of the first term. But they acquire that interest only by virtue of a valid assignment. It must be a lawful title, capable of carrying all the incidental advantages, whether conferred by the deed or conferred by law.

Proposition II. The defendants' machines are used in fraud of the law, and in violation of complainant's rights.

The thing patented means the machine, which is a thing that produces, and is not itself a product. It is proved that a set of knives for surface work will do good work for from sixty days to three months. That a Woodworth machine cannot be operated more than three months, without making the service knives, and the cutters for tonguing and grooving, anew.

In the case of *Wilson v. Rousseau and Easton*, 4 How., 646, it was held that, under the eighteenth section of the act of 1836, the exclusive right to make, use, and vend the thing patented is vested in the patentee, with a reservation in favor of the assignees or grantees of the right to use the thing *patented. That is to say, all assignees or [*112 grantees of the right to use the thing patented, who had machines in use at the time of the renewal, are by this reservation protected in the continued use of the specific machine or machines, but specially excluded from the right to make.

The reservation is specially limited to the continued use of the thing patented.

Mr. Justice Nelson, in the case referred to, (4 How., 646,) says, "The clause, in terms, seems to limit studiously the benefit, or reservation, or whatever it may be called, under or from the new grant, to the naked right to use the thing patented; not an exclusive right even for that, which might denote monopoly. Nor any right at all, much less exclusive, to make and vend. That seems to have been guardedly omitted."

There is a broad distinction between the continued use of the invention, and the continued use of the machine patented. The former necessarily carries with it the right to construct, whilst the latter excludes it. This distinction is clearly drawn by Mr. Justice Nelson in the same case (4 How., 683). He says,—“It may be said that the ‘thing patented’ means the invention or discovery, as held in *McClury v. Kingsland*, 1 How., 202, and that the right to use the ‘thing patented’ is

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what, in terms, is provided for in the clause. That is admitted; but the words, as used in the connection here found, with the right simply to use the thing patented, not the exclusive right, which would be a monopoly, necessarily refer to the patented machine, and not to the invention; and indeed it is in that sense that the expression is to be understood, generally throughout the patent law, when taken in connection with the right to use, in contradistinction to the right to make and sell." Again:—"The 'thing patented' is the invention; so the machine is the thing patented, and to use the machine is to use the invention, because it is the thing invented, and in respect to which the exclusive right is secured, as is also held in *McClurg v. Kingsland*. The patented machine is frequently used as equivalent for the 'thing patented,' as well as for the invention or discovery, and no doubt, when found in connection with the exclusive right to make and vend, always means the right of property in the invention,—the monopoly. But when in connection with the simple right to use, the exclusive right to make and vend being in another, the right to use the thing patented necessarily results in a right to use the machine, and nothing more." It is unquestionable, under this ruling of the Supreme Court, that the reservation *113] is strictly limited to a right *to the continued use of the specific machine or machines legally in use at the time of the renewal.

Let us ascertain with precision what this reservation is. It is not a reservation of the entire right to use the invention, as was used in the case of *McClurg v. Kingsland*, for the doctrine on which that case rests was expressly ruled out in the case of *Wilson v. Rousseau and Easton*, and the reservation expressly limited to the continued use of the specific machine or machines in existence at the time of the renewal.

It necessarily results from this ruling, that the reservation applies only to such inventions as are embodied in tangible, material form. Processes which are only directory, and simply teach how a product or result is to be obtained, do not come within the reservation, because these have no visible material existence;—such, for instance, as the process of tanning leather by submitting hides to the chemical action of a solution of such substances as contain the tannin principle; the process of curing India-rubber by mixing it with sulphur, and then subjecting it to the action of artificial heat, by which process this valuable substance is so changed as not to be affected by the changes of temperature, and by which it is also rendered insoluble; the various processes of bleaching fibrous and textile substances; the processes of fixing colors

on fabrics by the use of what are called mordants, which, by their chemical action on the colors, render them insoluble in water; Daguerreotyping, which consists in preparing the surface of a metal plate, with certain chemical agents, to render it so sensitive to the chemical action of light as to receive the impression of the lights and shadows of any object reflected on its surface; and a variety of other processes in the useful and fine arts, too numerous to specify, but which present some of the greatest triumphs which modern inductive science has applied to the wants of man.

All these do not come under the reservation of the 18th section of the act of 1836, as expounded in the case of *Wilson v. Rousseau and Easton*, because they have no tangible material existence. They are simply mental processes, which direct how and what matters to treat to produce the required results, and when the results are produced there is an end of the thing patented. True, the application of the process may require complex and costly apparatus; but unless such apparatus, as is sometimes the case, be not in itself the subject-matter of patent, the reservation does not apply, for the thing patented at the time of the renewal has no material existence. It is the thing patented, when existing in a material form at the time of the *new grant, to which the reservation applies alone, and not to the invention [*114 irrespective of this material existence.

True, the licensee or grantee of the right to use the invention may have invested thousands of dollars in the erection of costly apparatus by which to apply a patented process, such costly apparatus not being the subject-matter of the patent, and the moment the patent is renewed the costly apparatus becomes useless as regards its use under the license, but nevertheless it is not a waste, for the value of the patent to the patentee arises from the fact that it is vendible, and both the invention and the apparatus used in the application of it, being vendible things, can become the subjects of barter and sale.

We have thus shown that the reservation applies only to one class of inventions, namely, such as require the investment of capital in the thing patented; for there is a broad distinction between the investment of capital in the thing patented, and in apparatus and appliances for the application of the thing patented. For instance, the reservation does not apply nor look to the capital invested in workshops, warehouses, and the preparation of operatives to conduct a patented process. A licensee under the patent for casting iron rolls, which was the thing patented in the case of *McClurg v. Kingsland*,

may have expended thousands of dollars in the erection of workshops, in flasks and other moulds for casting chilled rolls under that patent, and in the preparation of operatives for carrying into effect the thing patented, but the moment the first term of the patent expires, and it is renewed, he cannot claim the right to the continued use of the invention under the renewed term, because the thing patented perishes or is destroyed by the act of a single use. It consists in so moulding the sand in which the roll is to be cast, as to make the channel through which the molten iron is to be poured into the moulds a tangent to the circle, that, in running in, it may take a whirling or circular motion, and thus, by the law of centrifugal force, throw the heavier or denser particles of iron outward, to form the outer surface of the roll or cylinder, the dross and less pure particles going towards the centre. In this case, the thing patented has no material existence beyond the single use. The moment the effect is produced, the thing patented is at an end, for the mould, being made of sand, is destroyed by the very act of producing the effect, and must be made over again for another application of the thing patented.

We shall allude again to this particular case in an after part of the argument.

*115] *As the reservation applies only to things patented which have a material, tangible existence, the question arises, in such cases, How long does this reserved right to use continue, or when does it expire? If it was a reservation to the right of the invention, as contended for by those who cited the case of *McClurg v. Kingsland* in the argument in the case of *Wilson v. Rousseau and Easton*, most unquestionably it would be without limit; but that was overruled by the Supreme Court, because of the broad distinction between the right to the invention, and the right to the continued use of the material machine patented, as we have already shown. Now, then, when does this reserved right to the continued use of the material machine patented cease? If it was coupled with the right to make, still it would be without limit. But as it was expressly ruled that the right to make is an exclusive right vested in the patentee, as a necessary consequence the reservation must expire with the existence of the material thing patented; the one, being an entire dependent of the other, must of necessity expire with it, as the branch dies with the trunk.

When the thing patented no longer has material existence, there is no longer any reserved right. This brings us to the inquiry, When does the material thing patented cease to exist?

The answer to this inquiry must clearly be, and can only be, when it is worn out or destroyed. For when, by any event, the material thing patented no longer exists, it can only be renewed under the authority of the exclusive right to make the thing patented, and therefore the reserved right expires the moment that the material thing patented is worn out or destroyed. This is manifest, and there is no flying from the conclusion.

This brings us to the final and most important branch of the argument. When does the material thing patented cease to exist? To ascertain this, we must first determine what is the thing patented, for we must first know that a thing was, before we can know that it is no more. That the thing patented is the thing invented, we have before shown to be the doctrine of the court in *Wilson v. Rousseau and Easton*.

Woodworth did not invent the frame, the cog-wheels, and shafts, and other elementary parts, which, when put together, constitute what is known as the Woodworth planing-machine. These are the mere appliances,—the mere elements of machinery,—which are as free for every man to use as the air he breathes. Nor did he invent the roller for making pressure to control the plank, nor the cutting instruments for planing, nor the cutter-beads or stocks to which the cutters are attached. *These, too, are public property, and at every man's [*116 command, to be freely made and used. As he did not invent any of these, and does not claim them in the letters patent as the thing patented, so the making of them does not come within the exclusive right to make, vested in the administrator by the renewal of the patent; nor does the use of them require the reservation of the statute. What, then, is the thing patented? Why, simply the combination of the cutting instruments or planes with the pressure roller, or an analogous device. The combining or putting these together, to effect the planing of planks, is the thing patented, because it is the thing invented; and in this sense the thing invented is the thing patented. As the making these things separately is not making the thing patented, the act of combining or putting them together, so that they shall be able to effect the planing of planks, is alone the making of the thing patented, the doing which is the exclusive privilege of the patentee.

If, then, as must be obvious, the putting or combining of these elements together in one machine is the making of the thing patented, then the converse of the proposition must also be true; namely, that the moment this combination ceases to exist, so soon the thing patented is extinct, and can only be renewed by the exercise of the right to make. We do not

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press this to the technical length of asserting that the simple act of disconnecting these elementary parts, such, for instance, as temporarily taking the roller or the cutting instruments out of the machine, destroys the thing patented, for that is merely a temporary act, with the intention to restore. But when any one of these elements is either worn out by use, or otherwise destroyed, then the combination invented—the thing patented—no longer exists, and cannot be restored without the exercise of the right to make. The capital which has been invested—not in the appliances to, but in the thing patented—has performed its office; it has lasted its days and vanished, and with it the reserved right which belonged to it alone. But, it may be said, it is a hardship for the man who invested his capital in the purchase of an entire machine, that he should be deprived of the use of it because one part only has worn out. The question of individual hardship cannot control the settlement of great legal questions. In the language of Mr. Justice Nelson in *Wilson v. Rousseau and Easton*, “We must remember that we are not dealing with the decision of the particular case before us, though that is involved in the inquiry, but with a general system of great practical interest to the country; and it is the effect of our *117] decision upon the operation of the *system that gives to it its chief importance.” If the question of pecuniary hardship could have a legitimate influence, it would not be difficult to demonstrate how much greater the hardship is to the patentee, by reason of the reservation under the most limited construction, than on the part of the grantee, by reason of the loss of the remnant of the machine, after the thing patented is worn out. But what becomes of the question of hardship in other cases where the thing patented has no material existence, as in the case of a chemical process requiring costly apparatus for the application of the process, which is the thing patented?

Let us take, for illustration, the patent granted to Charles Goodyear, for curing, or, as it is termed, vulcanizing India-rubber, by mixing it with sulphur, and then baking it by exposure to heat. The thing patented in this instance is a process, an immaterial thing which has no visible existence. It is simply a rule of procedure. But this rule of procedure can only be applied to produce the desired effect by means of costly machinery for grinding and mixing the India-rubber and sulphur, and moulds, and ovens, or boilers, for baking. Many manufacturers have been licensed to work under this patent. By reason of great poverty, occasioned by many years of fruitless experiments in search of this great discovery, he

was compelled to grant licenses far below their actual value. Should he obtain a renewal of this patent, as the thing patented is not a machine, and has no material existence, the licensees or grantees will not come under the reservation, will not the pecuniary loss to them be greater than any that can be sustained by the grantees under the Woodworth patent? Most assuredly it will, and yet for these there will be no remedy. They, however, as the grantees under the Woodworth patent, have received more than their reward; and so it will always be in similar cases, because none but valuable inventions can be renewed, and when the inventions have been of sufficient value to authorize the renewal, those who have used them have been remunerated.

But, as we before submitted, the hardship to the licensee or grantee is not a matter that can affect the judicial construction. The inquiry must look to the naked fact, when the material machine or thing patented ceases to exist.

(The counsel then proceeded to illustrate the above principles by other examples.)

The counsel for the defendants made the following points.

I. The Circuit Court, as a court of equity, had no jurisdiction under the acts of Congress, the parties not being citizens *of Louisiana, the subject of controversy not arising [*118 there, the equitable relief not being applicable there. [118 and the right of the complainant not having been established at law. Act of 1789, § 11 (1 Stat. at L., 78); Act of 1793, § 5 (1 Stat. at L., 322); Act of 1800, § 3 (2 Stat. at L., 37); Act of 1819, § 1 (3 Stat. at L., 481); Act of 1836, § 17 (5 Stat. at L., 124); Act of 1839, § 11 (5 Stat. at L., 354).

II. If the Circuit Court possess the fullest equitable jurisdiction, still the complainant cannot, on the general and well-settled principles which govern the interposition of a court of equity, obtain redress by such a bill; nor is he entitled to such relief as he asks.

He must establish at law the infringement of his right to the "thing patented," the illegal use thereof by the defendants, and the damages he has sustained thereby. His right in equity is merely to restrain the continued illegal use of the thing patented, when so established.

By what principle or rule, governing a court of equity, can he ask it, in an action such as this, and between these parties, to declare an agreement between other parties, and all rights under it, void?

What part of the patent law entitles the complainant to an account?

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How are damages for the infringement to be obtained by proceedings in equity? Act of 1836 (5 Stat., 117, 123): 2 Story, Eq., § 794 *et seq.*, § 934; Dwaris on Statutes, 744, Curtis on Patents, 358, 370, 375, 381, and cases cited; Phillips on Patents, 452; *Whittemore v. Cutter*, 1 Gall., 429, *Miller v. Taylor*, 4 Burr., 2400; *Hill v. Thompson*, 3 Meriv., 622; *Bailey v. Taylor*, 1 Russ. & M., 74; 3 Myl. & C., 735; 4 Myl. & C., 435, 487; 1 Woodb. & M., 435, 220, 280, 290, 376; 2 Woodb. & M., 28.

III. The complainant has no title on which he can found an action against the defendants. They claim no interest adverse to his. He holds the exclusive right to make, use, and vend the machines in Escambia County, Florida, under the new or extended grant. These machines are not made or used in contravention of that grant; they are no infringement of "the thing patented" to him; the defendants have not made, used, or sold the thing patented to him. The act of 1836, § 14, (5 Stat. at L., 123,) establishes his right to sue, and cannot be construed to embrace a machine, lawfully made, before his grant accrued. *Wilson v. Rousseau*, 4 How., 681, 682, 684; Jacob's Law Dict., *Quitclaim, Assignment*.

*119] IV. Nor is the machine used by the defendants proved to be identical with that to which the complainant claims the exclusive right.

They held under the patent of Emmons as much as that of Woodworth; both patents were identical in many respects; the testimony is entirely imperfect and insufficient so far as it describes the exact character or construction of the machines used by the defendants.

Woodworth purchased the right to use Emmons's patent during the existence of his first grant, and held this right when the defendants took their assignment; there is no proof, in this action, to show how far the defendants' machines, though called "Woodworth's," were made under one right or the other. The only "Woodworth machine" traced to the possession of the defendants never was used by them.

V. The right of defendants to use Woodworth's planing-machine (whether constructed under Woodworth's patent exclusively, or under that and Emmons's combined) in Escambia County, Florida, was completely vested on the 1st of June, 1836. The assignments were according to law. Act of 1793, § 4 (1 Stat. at L., 322).

The claim of title, as set out in the record, is complete. The agreement of 28th November, 1829, is founded on a full and legal consideration; the attempt to establish its invalidity on the ground of fraud is totally unsustained by any evidence,

and at variance with the whole conduct of Woodworth and the character of his proceedings. The assignments subsequent to the agreements are in due form; they were all duly recorded, though this was not required by any act in existence at the time when the title of Forsyth was complete.

But it is altogether immaterial in this suit whether this be so or not. The complainant (Wilson) cannot avail himself of it. The machine is no infringement of his right. It was erected and used under Woodworth's right; it was in being when that terminated. If illegally used, it was and is an infringement of that right,—not of the complainant's; and to Woodworth and his representatives alone belongs the claim for redress.

VI. After the decision of this court (*Simpson v. Wilson*, 4 How., 711), it is needless to answer the allegations of the bill which charge the act of vending the products of the machine elsewhere than in Escambia County as an infringement. That decision has conclusively affirmed his right to do so.

VII. The right of the defendants, as established by the act of 1836, and confirmed by the Supreme Court, is the right to "continue to use" the "thing patented" to the [*120 extent of their interest therein. This is all they have done; they have not exercised, during the renewed term, any other right derived under the assignment; they have not made or vended any machine; they have merely continued to use that which they had in use when the original term expired.

The attempt to sustain the allegations of the bill, which charge the defendants with fitting up new machines since the 27th of December, 1842, or so reconstructing the old ones, since that time, as to make them essentially new ones, has totally failed. The evidence produced by the complainant negatives the allegations on both points. In allowing the continued use of the machines in existence on the 27th of December, 1842, this court evidently contemplated such repairs as were required to preserve them. *Wilson v. Rousseau*, 4 How., 707; *Woodworth v. Curtis*, 2 Woodb. & M., 528; *Boyd v. Brown*, 3 McLean, 295; *Boyd v. McAlpin*, 3 McLean, 427.

Mr. Justice WAYNE delivered the opinion of the court.

In the argument of this case, the counsel for the appellant put his right to the relief sought by his bill upon two points. We will consider them in the order in which they were presented.

The appellant's first point is, that the title and right of the defendants to use the Woodworth invention are taken from

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them by the fraud and artifice of Emmons, Tyack, Toogood, and Halstead, in procuring from Woodworth and Strong the deed of the 28th of December, 1829. (Rec., 51, 52.)

The fraud alleged in the bill is, that Emmons, having pirated Woodworth's invention, contrived, by misrepresentation, to get a patent for the same, and, in conjunction with Toogood, Halstead, and Tyack, falsely and fraudulently represented to Woodworth, and to Strong, his assignee, that Emmons was the first inventor of the planing-machine, for which Woodworth had received the first patent; and that Woodworth and Strong, regarding it possible that such might be the fact, not suspecting any fraudulent device, and fearing, notwithstanding Woodworth knew the invention to be his own, it might be established against him, executed the agreement of the 28th of November, 1829, for which no other consideration was received than Emmons's pirated patent.

The case is before us upon the original bill, and as it was afterwards amended, upon answers and replication. The defendants traverse this allegation of fraud, as fully as persons so situated can do, and deny any notice or knowledge about it, when they became the assignees of the invention *121] for a *valuable consideration. The complainant, then, must establish his charge by proofs. We think it has not been done.

The proof relied upon is, that, though Emmons received a patent for what he claimed to be his invention, it was subsequently proved to be identical with the principle of Woodworth's machine, and had been pirated from it. That, at the time Emmons applied for a patent, he had not, in any way, carried his machine into such a practical result, either in a model or execution, as to entitle him to letters patent. To this is added the declaration of two witnesses, Harris and Gibson, in a joint deposition — (one of them we may suppose interested, from not having disavowed it, as his associate Gibson does), — “that they called upon Emmons in the city of New York, several years since, and shortly previous to his death, for the purpose of obtaining information in relation to an invention of a planing-machine, said to have been invented by him while residing at Syracuse. That he then informed them, that in the year 1824, being engaged in the erection of salt-vats at Syracuse, he had contrived a machine by which the plank used for salt-vats could be joined by means of knives upon a revolving cylinder. That he went so far as to satisfy himself, that boards and plank might be joined in that way; but the machine was never so far completed as to perform work with it: that he left Syracuse in July, 1824, and

thought no more of the subject, until after William Woodworth had obtained his patent, when he was employed by Toogood, Tyack, and Halstead to defeat it."

Such is the testimony in this record in support of the charge, that the mutual deed of the 28th of November, 1829, was obtained by fraud. It is under that deed that the defendants claim the right to use the Woodworth machines in their possession.

Apart from the insufficiency of such testimony, in combination or separately, to establish the fraud, if we suppose it had been sworn to by Emmons, it would be only hearsay, and not within any exception to the rule rejecting hearsay testimony. It is not so, on account of its being a dying declaration, or one made by Emmons at variance with his interest. Neither can it be brought under the exception, as an admission by one who is a party to a suit with others identified in interest with him; nor as coming from one having any interest in the suit, without being a party to the record with others who are so. And it is not the admission of one interested in the subject-matter of the suit, where the law, in regard to that source of evidence, looks chiefly to the parties in interest, and gives to *their admissions the same weight as though they were [*122 parties to the record.

In fact, the declaration said to have been made by Emmons is merely hearsay; it cannot be made evidence for any purpose, of itself, or in connection with any other proof in the case not liable to any objection; it can neither aid nor be aided by other evidence.

We have put its exclusion on the ground stated, on account of the relations which the record shows Emmons had with some of the parties, rather than upon the little credit to which such a declaration from him would be entitled, from the difference and opposition between it and such as Emmons must have made when he applied for, and obtained, letters patent for what he claimed to be his invention.

Let us suppose, however, Emmons to be a competent witness to avoid an instrument obtained by the fraudulent devices of himself and his associates; and that there were independent corroborating proofs in confirmation of his credit in such a case. Still the declaration imputed to him would not, in any way, have disparaged the right or title of the assignees, under the deed of the 28th of December, 1829, their right having been acquired without notice of the fraud which the complainant says was practised upon Woodworth and Strong.

Wilson v. Simpson et al.

The complainant can have no benefit under the first point urged by his counsel.

The second point upon which the counsel rely is, that the defendants, as assignees under the deed, continue to use their machines, in fraud of the law, and in violation of the rights of the complainant. The specifications under the general proposition are, that the defendants have substituted other machines for those used by them, before the expiration of the first term of Woodworth's patent. That they have reconstructed Woodworth's entire combination in the frames of their old machines, or supplied an essential constituent part of it, to continue in use those machines which this court said they had a right to use as assignees, when this case was before it, upon certified points, in the year 1846. 4 How., 709, 711.

There is no proof of either the first or second specification.

But the questions which were argued by counsel,—when repairs destroy identity and encroach upon invention, or when the thing patented ceases to exist, so as to exclude the repair or replacement of any one part of its combination, in connection with the rest of it, not requiring repair, or to be replaced,—are before the court upon the evidence in the record.

We admit, for such is the rule in *Wilson v. Rousseau*, 4 *123] *Howard, that when the material of the combination ceases to exist, in whatever way that may occur, the right to renew it depends upon the right to make the invention. If the right to make does not exist, there is no right to rebuild the combination.

But it does not follow, when one of the elements of the combination has become so much worn as to be inoperative, or has been broken, that the machine no longer exists, for restoration to its original use, by the owner who has bought its use. When the wearing or injury is partial, then repair is restoration, and not reconstruction.

Illustrations of this will occur to any one, from the frequent repairs of many machines for agricultural purposes. Also from the repair and replacement of broken or worn out parts of larger and more complex combinations for manufactures.

In either case, repairing partial injuries, whether they occur from accident or from wear and tear, is only refitting a machine for use. And it is no more than that, though it shall be a replacement of an essential part of a combination. It is the use of the whole of that which a purchaser buys, when the patentee sells to him a machine; and when he

repairs the damages which may be done to it, it is no more than the exercise of that right of care which every one may use to give duration to that which he owns, or has a right to use as a whole.

This foundation of the right to repair and replace, and its application to the point we are considering, will be found in the answers which every one will give to two inquiries.

The right to repair and replace in such a case is either in the patentee, or in him who has bought the machine. Has the patentee a more equitable right to force the disuse of the machine entirely, on account of the inoperativeness of a part of it, than the purchaser has to repair, who has, in the whole of it, a right of use? And what harm is done to the patentee in the use of his right of invention, when the repair and replacement of a partial injury are confined to the machine which the purchaser has bought?

Nothing is gained against our conclusion by its being said that the combination is the thing patented, and that, when its intended result cannot be produced from the deficiency of a part of it, the invention in the particular machine is extinct. It is not so. Consisting of parts, its action is only suspended by the want of one of them, and its restoration reproduces the same result only, without the machine having been made anew. Of course, when we speak of the right to restore a part of a deficient combination, we mean the part of one entirely *original, and not of any other patented thing which has been introduced into it, to aid its in- [*124 tended performance.

Nor is it meant that the right to replace extends to every thing that may be patented. Between repairing and replacing there is a difference.

Form may be given to a piece of any material,—wood, metal, or glass,—so as to produce an original result, or to aid the efficiency of one already known, and that would be the subject for a patent. It would be the right of a purchaser to repair such a thing as that, so as to give to it what was its first shape, if it had been turned from it, or, by filing, grinding, or cutting, to keep it up to the performance of its original use. But if, as a whole, it should happen to be broken, so that its parts could not be readjusted, or so much worn out as to be useless, then a purchaser cannot make or replace it by another, but he must buy a new one. The doing of either would be entire reconstruction.

If, however, this same thing is a part of an original combination, essential to its use, then the right to repair and replace recurs. That this is so may be more satisfactorily

shown by the Woodworth planing machine than any other we know, and particularly by the complaint here made against these defendants.

Woodworth's greatest merit, showing his inventive genius, is the adaptation of a well-known tool to a new form and mechanical action, giving an almost wonderful efficiency to its use, and which, in the hundred efforts which had been made before, had not been accomplished. We mean its cutters for planing, tonguing, and grooving.

The complaint now is, that the defendants, in the use of their old machines, have replaced new cutters for those which were worn out, in fraud of the ruling of this court in its answer to the first point certified when this case was formerly here. *Simpson et al. v. Wilson*, 4 How., 709.

This court then said, that the renewal of the patent granted to William Woodworth, to William W. Woodworth, his executor, did not inure to the benefit of the defendants, to the extent they were interested in it before the renewal and extension, but that the law saved to persons in the use of the machines at the time the extension took effect the right to continue the use. *Simpson et al. v. Wilson*, 4 How., 711.

Wilson and Rousseau's case, in 4 Howard, was very fully considered by this court. There were differences of opinion between the judges, as to the interest which assignees of an invention had in it under the eighteenth section of the act of *1836, after the expiration of the first term of a patent, *125] when there had been a renewal and extension of it. But it certainly did not occur to either of us, that the language then used by the court, and afterwards in *Simpson et al. v. Wilson*, could make any difficulty in its application, or that it was subject to misapprehension.

It does not permit an assignee of the first term of a patent, after its renewal and extension, to make other machines, or to reconstruct it, in gross, upon the frames of machines, which the assignee had in use when the renewal and extension of the patent took effect. But it does comprehend and permit the re-supply of the effective ultimate tool of the invention, which is liable to be often worn out or to become inoperative for its intended effect, which the inventor contemplated would have to be frequently replaced anew, during the time that the machine, as a whole, might last.

The proof in the case is, that one of Woodworth's machines, properly made, will last in use for several years, but that its cutting-knives will wear out and must be replaced at least every sixty or ninety days.

The right to replace them was a part of the invention transferred to the assignee for the time that he bought it, without which his purchase would have been useless to him, except for sixty or ninety days after a machine had been put in use. It has not been contended, nor can it be, that such can be a limitation of the assignee's right in the use of the invention.

If, then, the use of the machine depends upon the replacement of the knives, and the assignee could replace them from time to time, as they were needed, during the first term of the patent, though they are an essential and distinct constituent of the principle or combination of the invention, frequently replacing them, according to the intention of the inventor, is not a reconstruction of the invention, but the use only of so much of it as is absolutely necessary to identify the machine with what it was in the beginning of its use, or before that part of it had been worn out.

The right of the assignee to replace the cutter-knives is not because they are of perishable materials, but because the inventor of the machine has so arranged them as a part of its combination, that the machine could not be continued in use without a succession of knives at short intervals. Unless they were replaced, the invention would have been but of little use to the inventor or to others. The other constituent parts of this invention, though liable to be worn out, are not made with reference to any use of them which will require them to be *replaced. These, without having a definite duration, are contemplated by the inventor to last [*126 so long as the materials of which they are formed can hold together in use in such a combination. No replacement of them at intermediate intervals is meant or is necessary. They may be repaired as the use may require. With such intentions, they are put into the structure. So it is understood by a purchaser, and beyond the duration of them a purchaser of the machine has not a longer use. But if another constituent part of the combination is meant to be only temporary in the use of the whole, and to be frequently replaced, because it will not last as long as the other parts of the combination, its inventor cannot complain, if he sells the use of his machine, that the purchaser uses it in the way the inventor meant it to be used, and in the only way in which the machine can be used.

Such a replacement of temporary parts does not alter the identity of the machine, but preserves it, though there may not be in it every part of its original material.

Such being the case, and this court having determined

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that the statute providing for the extension and renewal of patents saves the rights of assignees in the use of the machines which they may have in operation when the extension takes effect, we do not think that the defendants in this case, from having replaced cutter-knives in their machines, have been using them in fraud of the law, or in violation of the rights of the complainant.

We shall, therefore, direct the decree of the court below, dismissing the complainant's bill, to be affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

*127] *THE UNITED STATES, PLAINTIFFS IN ERROR, v. JOSEPH REYNES.

The act of Congress of May 26, 1824 (4 Stat. at L., 52), for enabling claimants to land within the limits of the State of Missouri and Territory of Arkansas to institute proceedings to try the validity of their titles, and which was revived by the act of June 17th, 1844 (5 Stat. at L., 676), did not embrace within its operation complete or perfect titles to land.¹

It applied to incomplete titles only, derived either from Spanish, French, or British grants, and of these provided for such only as had been legally issued by a competent authority, and were protected by treaty.

The act, as revived and reenacted as aforesaid, was not designed to invest the holders of imperfect titles with new or additional rights, but merely to provide a remedy by which legal, just, and *bonâ fide* claims might be established.

The treaty of St. Ildefonso, between Spain and the French Republic, and that of Paris, between France and the United States, should be construed as binding on the parties thereto, from the respective dates of those treaties.²

Upon no plausible pretext could it be denied that the treaty of St. Ildefonso was obligatory upon Spain from the period of her acceptance of the provision made for the Duke of Parma, in pursuance of that treaty, viz. on the

¹ FOLLOWED. *United States v. Philadelphia & New Orleans*, 11 How., 609, 647; *United States v. Constant et al.*, 12 Id., 437; *United States v. Roselius*, 15 Id., 34.

² CITED. *Davis v. Police Jury of Concordia*, post, *280, 288; *United States v. Bridleman*, 7 Fed. Rep., 902; s. c., 7 Sawy., 251; *United States v. Martin*, 14 Fed. Rep., 820; s. c., 8 Sawy., 478.

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21st of March, 1801, or from the date at which she ordered the surrender of the Province of Louisiana to France, viz. on the 15th of October, 1802.³ A grant by Morales, the Spanish governor, issued on the 2d of January, 1804, for lands included within the limits of Louisiana, was void; Spain having parted with her title to that Province to France, by the treaty of St. Ildefonso, on the 1st of October, 1800; and France having ceded the same Province to the United States by the treaty of Paris of the 30th of September, 1803.⁴ Such a grant could not be protected by that article of the treaty of Paris which stipulated for the protection of the people of Louisiana in the free enjoyment of *their liberty and property*; the term *property*, in any correct acceptation, being applicable only to possessions or rights founded in justice and good faith, and based upon authority competent to their creation.⁵ The circumstance, that the Spanish authorities retained possession of portions of Louisiana till the year 1810, did not authorize the issuing of grants for land by those authorities, upon the ground that they constituted a government *de facto*, Spain having long previously ceded away her right of sovereignty, and her possession subsequently thereto having been ever treated by the United States as wrongful, viz. after October, 1800. The decisions of this court in the cases of Foster and Neilson, and Garcia and Lee, sustaining the construction of the political department of the government upon the question of the limits of Louisiana, reviewed and confirmed.

THIS was an appeal from the District Court of the United States for the District of Louisiana.

On the 10th of December, 1803, the following certificate of survey was issued:—

“I, Don Vincente Sebastian Pintado, captain of militia cavalry and deputy surveyor of this Province, do hereby certify, that there has been measured and the boundaries marked of a tract of land for Don José Reynes, containing 40,000 superficial arpents, measured by the perch of the city of Paris, of 18 feet of said city, calculating 100 superficial perches to the arpent, according to the agrarian custom of this Province, which tract is situated $4\frac{1}{3}$ miles to the south of the boundary-line between the domains of his Majesty and the United States of America, *bounded on the north [*128 by lands belonging to Don Jaime Jorda, Don Manuel de Sanzós, and on all the other sides by vacant lands, the River Comite, and a branch of said river, commonly called Canaveral Creek, passing in the centre of said tract, all of which are clearly described in the preceding plan signed by me, in which plan said tract is represented with the dimensions of its boundaries in lineal perches of Paris, the direc-

³ FOLLOWED. *United States v. D'Auterive*, 10 How., 623.

⁴ APPLIED. *Montaulet v. United States*, 12 How., 61. FOLLOWED. *United States v. Pillerin*, 13 How., 9.

INAPPLICABLE. *United States v. Davenport's Heirs*, 15 How., 8.

⁵ FOLLOWED. *United States v. Lynde*, 11 Wall., 643.

tions of the boundaries by the compass, the declination or variation of which is in the direction northeast, the trees and mounds intended as landmarks, and all other natural and artificial limits. The said 40,000 arpents were bought by the interested party from the royal treasury, and were ordered to be measured and appraised by a decree of the General Intendancy of this Province, under date of the 1st of September last, sent to Carlos de Grandpré, colonel of the royal armies, civil and military governor of the post of Baton Rouge and of its dependencies, and sub-delegate of the General Intendancy, who notified me of said decree, and of its contents.

“ And said Excellency, the governor and sub-delegate, having appointed Don Pedro Allen and Don Felix Bernardo Dumontier appraisers on behalf of the government, and the agent of the party, Don Antonio Gras, having named Don Philippe Hickey and Don Bernardo Dubrocar, said gentlemen being assisted by two witnesses, to wit, Don Thomas Valentin Dalton and Juan Poret, appraised the aforesaid tract at the price and sum of six thousand dollars, or at the rate of fifteen cents per superficial arpent; the agent of the party, being informed of said appraisement, consented and approved it, receiving said tract as purchased, acknowledging the delivery thereof; and, with the appraisers and witnesses, signed these presents in Baton Rouge on the 19th day of the month of November, of the year 1803.

(Signed,)

ANTONIO GRASS,
VINCENTE SEBASTIAN PINTADO,
PEDRO ALLEN,
FELIX BERNARDO DUMONTIER,
PHILIP HICKEY,
BERNARDO DUBROCAR,
VN. DALTON,
JUAN PORET.

“ The foregoing plan and explanations, or description, have been registered, in the office of general measuration, in book D, No. 4, folio 84, and the plan numbering 1672.

“ 10 December, 1803. Signed by me as Surveyor-General.

*[129] “ I certify that the foregoing is a correct copy of the original filed with the documents of the case, and I give the present in virtue of a decree from the Intendant-General, dated 6th of the present month of December, dated as above.

(Signed,)

CARLOS TRUDEAU,
Surveyor-General.”

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On the 2d of January, 1804, the following grant was made:—

“Don Juan Ventura Morales (*contador de exercito*), comptroller for the army, intendant and superintendent *pro tempore* of the Province of West Florida, minister commissioned with the adjustment and final settlement of the affairs of the royal *hacienda* (domains) in the Province of Louisiana. Whereas, Don José Reynes, an inhabitant and merchant of this city, has presented himself before this tribunal, soliciting to purchase from the royal treasury 40,000 superficial arpents of land, of those vacant and belonging to the crown, the value of which he offers to pay, under appraisement, in letters of credit, issued by the department of the royal treasury, I ordered, in consequence of said demand, that a certified copy should be furnished by the secretary of the official letter addressed by this intendancy to the commissioners appointed for the transfer of this Province, on the subject of a petition presented by Don Thomas Urquhart, and of the answer made by said commissioners; and that these be submitted to the Sen'r Fiscal (solicitor of the crown). Those formalities having been fulfilled, and no opposition being made to said petition from the answer given by said Sen'r Fiscal, whose opinion was favorable thereto, and who recommended that an order be issued to Colonel Carlos de Grandpré, governor and sub-delegate of the royal treasury in Baton Rouge, to appoint two citizens of experience, who in the character of appraisers, with two others whom the purchaser shall designate, and two assistant witnesses, should proceed to the appraisement, survey, and mark the limits of the 40,000 arpents of land, and make a return of the proceedings in order to carry out the object contemplated. I further ordered to be furnished a certified copy of the order under which the Auditor of War was consulted on the proceedings had in the case of the aforesaid Urquhart, with regard to a similar application, and of the opinion which he (the Auditor of War) expressed; and, this having been done, I approved the same, directing an order to be sent to the said governor and sub-delegate of the royal treasury, as recommended by the Sen'r Fiscal, and for the purposes which he determined, which *was accordingly done; and, in virtue of said order, the operations of survey were performed, and forthwith were measured, surveyed, the limits defined, and marked with stakes, of the 40,000 superficial arpents of land solicited by Don José Reynes; all of which land is in one body or tract, situated in the district of Baton Rouge, and in the spot which will be named hereafter, with a description of the boundaries, by the

compass, and situation. This tract of land was valued at \$6,000, or at the rate of 15 cents per superficial arpent; which appraisement I ordered to be submitted to the Sen'r Fiscal, who approved it, and decided that, on payment being made by Don José Reynes in the royal coffers of said sum of \$6,000, the same being the value of the land, say 40,000 superficial arpents, according to the figurative plan, also the payment of the duty of *media anata* (half-yearly tribute), and 18 per cent. for the transportation of this tribute to the kingdom of Castilla, a title of property should be given to him. That, agreeably and in conformity with this order of the Sen'r Fiscal, I ordered that the Surveyor-General, Don Carlos Trudeau, should examine the operations, or proceedings of survey, made by Don Vincente Pintado; and, if he found them correct, that he should record in his books the plan representing the 40,000 arpents of land solicited by the aforesaid Reynes, and furnish a copy of said plan to accompany the title. That, these formalities having been complied with, I approved, by an act bearing date of 19th of December last, the valuation made of said 40,000 superficial arpents, and ordered that the documents should be sent to the minister of the royal treasury for a liquidation of the value of the land; and, on its being shown that the amount due to the royal treasury had been entirely paid in the royal coffers, in certificates of credit, as proposed by said Don José Reynes, also with the sum for the (*media anata*) half-yearly tribute to the king, and for its transportation to Spain, that then a title of property, in due form, should be given to the party. From the receipt of payment given by the ministry of the royal treasury, bearing date 31st of December last, which receipt is with the proceedings to which I refer, it appears that the said Don José Reynes did pay in the royal coffers 49,416 reales (bits) of silver: 48,000 for the price of the land, at 15 cents per arpent, and the balance, 1,416 reales, for the 2½ per cent. for the half-yearly tribute, and 18 per cent. for the transportation of tribute to Spain; in consequence of which, and it being evident, from the plan and proceedings of survey furnished by the Surveyor-General, Don Carlos Trudeau, bearing No. 1,672, that the said 40,000 superficial arpents are situated in the district *131] of Baton *Rouge, at four miles and one third south of the boundary-line between the domains of his Catholic Majesty and the United States of America, bounded on the north by lands belonging to Jayme Jorda, a captain of the army, and those of an officer of the same grade, Don Manuel de Sanzos; and on the other sides by vacant lands, the River Comite passing through the centre of the said 40,000 arpents,

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which are also intersected by a branch of said river commonly called the Canaveral.

"Therefore, and agreeably to the power delegated to me, I do hereby grant, under title of sale, to the above-named Don José Reynes, the 40,000 superficial arpents of land which he petitioned for, in the spot, and within the District of Baton Rouge, where they have at his instance been measured, bounded, and surveyed, under the aforesaid limits, as represented by the plan and measurement above cited; all of which, for the better understanding of what is here set forth, as well as the directions, distances, and localities, shall be annexed to this title; and I impart to him (Don José Reynes) entire and clear dominion over said 40,000 arpents of land, that, as his own lands, from having purchased and paid for them to the royal treasury, he may possess, cultivate, and dispose of them at his pleasure; and I do authorize him to take possession of them; in which possession I do hereby place him, without prejudice to any third person who might have a better right.

"In testimony whereof, I have ordered these presents to be delivered under my signature, sealed with my coat of arms, and countersigned by the undersigned, notary of the royal treasury, who, as well as the principal comptroller, will register this act.

"Given in New Orleans, on the 2d day of January, 1804.

(Signed,)

JUAN VENTURA MORALES.

"By order of the Sen'r Intendant.

CARLOS XIMENES.

"The above title has been registered in folio 37 to 40 of the book under my charge destined to that effect, and for titles of said class.

(Signed,)

CARLOS XIMENES.

"Registered in the office of the principal comptroller for the army, and also in the office of the royal treasury, (both of which are under our charge,) at page 38 of the book destined to that effect and purpose.

(Signed,)

GILBERTO LEONARD.

MANUEL ARMIREZ."

On the 26th of May, 1824, Congress passed an act (4 Stat. at L., 52), from which the following are extracts.

*The first section declares,—“That it shall and may be lawful for any person or persons, or their legal representatives, claiming lands, tenements, or hereditaments in that part of the late Province of Louisiana which is now included within the State of Missouri, by virtue of any French

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or Spanish grant, concession, warrant, or order of survey, legally made, granted, or issued, before the 10th day of March, 1804, by the proper authorities, to any person or persons resident in the Province at the date thereof, or on or before the 10th day of March, 1804, and which was protected or secured by the treaty between the United States of America and the French Republic, of the 30th day of April, 1803, and which might have been perfected into a complete title under and in conformity to the laws, usages, and customs of the government under which the same originated, had not the sovereignty of the country been transferred to the United States," to present a petition to the District Court of Missouri, setting forth their claim, and praying that the validity of such title of claim might be inquired into and decided by the said court. The United States were to put in their answer by the District Attorney, and the proceedings in the cause were to be conducted according to the rules of a court of equity.

By the second section it is enacted:—"And the said court shall have full power and authority to hear and determine all questions arising in said cause relative to the title of the claimants; the extent, locality, and boundaries of the said claim, or other matters connected therewith fit and proper to be heard and determined; and by a final decree to settle and determine the question of the validity of the title, according to the law of nations; the stipulations of any treaty, and proceedings under the same; the several acts of Congress in relation thereto; and the laws and ordinances of the government from which it is alleged to have been derived; and all other questions properly arising between the claimants and the United States."

The act of 17th June, 1844 (5 Stat. at L., 676), entitled "An act to provide for the adjustment of land claims within the States of Missouri, Arkansas, and Louisiana, and in those parts of the States of Mississippi and Alabama south of the thirty-first degree of north latitude, and between the Mississippi and Perdido Rivers," revived and reenacted so much of the act of 26th May, 1824, entitled "An act to enable claimants to land within the State of Missouri and Territory of Arkansas to institute proceedings to try the validity of their claims," so far as the same related to the state of Missouri, and extended the same to the States of Louisiana and Arkansas, and to so much *of the States of Mississippi and Alabama as is

*133] above described, "in the same way, and with the same rights, powers, and jurisdictions, to every extent they can be rendered applicable, as if these States had been enumerated in the original act hereby revived, and the enactments ex-

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pressly applied to them as to the State of Missouri; and the District Court, and the judges thereof, in each of these States, shall have and exercise the like jurisdiction over the land claims in their respective States and districts, originating with either the Spanish, French, or British authorities, as by said act was given to the court and the judge thereof in the State of Missouri."

The treaty of cession by Spain to France is dated 1st October, 1800, and its terms will be found stated in the treaty of cession by France to the United States, dated 30th April, 1803 (8 Stat. at L., 200). The act of delivery by Spain to France took place on the 30th of November, 1803, and by France to the United States on the 20th of December, 1803. State Papers, Foreign Relations, Vol. II., page 582 *et seq.*

On the 13th of March, 1846, Reynes filed the following petition:—

"To the Honorable the District Court of the United States in and for the District of Louisiana.

"The petition of Joseph Reynes, who resides in the city of New Orleans, respectfully represents:

"That by inheritance, being the sole heir of his father, Joseph Reynes, now deceased, he is the owner of forty thousand arpents of land, situated in what was formerly called, under the government of the king of Spain, the district of Baton Rouge, four miles and one third south of the boundary-line between the then territory of the king of Spain and the territory of the United States of America, being bounded on the north by lands the property of James Jorda, and by property of Manuel de Sanzos, and on the other sides by vacant lands; as will more fully appear by an authentic copy of the original act of sale and grant, by Juan Ventura Morales, commissary of the army, intendant and superintendent *ad interim* for the Province of West Florida, minister charged with the final settlement of all affairs relating to the royal treasury of the king of Spain in Louisiana, to the said Joseph Reynes, deceased, and to the documents, plans, and surveys appended to the same; all of which are authentic, and are referred to and made a part of this petition.

"Petitioner further alleges, that said land is believed to be situated in the parishes of East Feliciana and St. Helena, according to the present territorial divisions of this State.

"*Petitioner alleges, that his said father acquired the said land by purchase and grant from said Juan [*134 Ventura Morales, the duly authorized officer and agent of

the government of Spain, the sovereignty over the territory in which the said land is situated at the time of the aforesaid purchase and grant. That said Morales had full authority from the government of Spain to sell the said land, and to grant a good and perfect title thereto.

"All of which more fully appears from the annexed documents, and also from the original grant from Morales, which has been mutilated by robbers, who entered and robbed the dwelling-house of the petitioner. The said original act in the form in which it now exists is hereunto annexed, together with the plan of the original survey.

"Petitioner alleges, that the survey was made and returned by the duly authorized officers of the government of Spain, on the 19th day of November, A. D., 1803, and that on the 31st day of December, A. D., 1803, the money was paid by his said father to the government of Spain for the land; and that the above-mentioned grant was made to his father on the 2d day of January, A. D., 1804.

"That at the date of the said sale and grant to his father, he was a resident of the Province of Louisiana. That the said grant was protected by the treaty between the United States and the French Republic of the 30th day of April, 1803. And that said grant might have been perfected into a complete title under and in conformity to the laws, usages, and customs of the government of Spain, had not the sovereignty of the country been transferred to the United States.

"Petitioner further alleges, that the said grant did convey to his said father a full and complete title to the said land, under the laws, customs, and usages of the government of Spain.

"Petitioner alleges, that his claim to the above-mentioned land was presented to the commissioner of the United States for confirmation, and the same was refused, as will be more fully seen by reference to the report of James O. Cosby, the said commissioner, to be found in the 18th volume of the American State Papers, at pages 59 and 66.

"That the United States government has refused, and still refuses, to recognize and confirm the said claim, and has asserted a claim to the same. And that various persons have pretended to set up claims to said land adverse to the rights of the petitioner, to wit, the following persons: L. Saunders, M. Harris, H. Hardesty, Ira Bowman, John Morgan, Josiah Benton, Z. S. Lyons, and Henry Hawford.

*[135] "Wherefore petitioner prays, that the District Attorney of the United States, in behalf of the United States, and the said L. Saunders, M. Harris, H. Hardesty, Ira

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Bowman, John Morgan, Josiah Benton, Z. S. Lyons, and Henry Hawford, be cited to answer this petition, and that, after all due proceedings had, the validity of petitioner's claim be inquired into, and that he be decreed to be the true and lawful owner of the said forty thousand arpents of land. And that for so much of said land as shall be ascertained to have been sold by the United States, the petitioner shall be allowed a like quantity of the public lands belonging to the government of the United States, as provided for by law, and for all other relief in the premises, &c., &c.

(Signed,)

ELMORE & KING,
Solicitors for Complainant.

"Joseph Reynes, being duly sworn, deposeth that the allegations of the above petition are true.

(Signed,)

REYNES.

"Sworn to and subscribed before me, this 13th of March, 1846.

(Signed,)

L. E. SIMONDS, *Deputy Clerk.*"

Annexed to this petition were the above-recited certificates of survey and grant.

In June, 1846, sundry witnesses were examined on behalf of the petitioner, for the purpose of verifying the signatures, &c.

The District Attorney appeared on behalf of the United States, and traversed the petition. The other defendants allowed judgment to go against them by default.

On the 3d of November, 1846, the court pronounced the following decree:—

"The court having heretofore taken this case under consideration, and having maturely considered the same, doth now order, adjudge, and decree, that the petitioner recover the land claimed in his petition, and described in the survey of Pintado, revised by Trudeau, appended thereto; and if it should happen that any portion of said land has been sold or otherwise disposed of by the United States, it is ordered that for such portions the petitioner have the right to enter other lands belonging to the United States, at any land office in Louisiana, according to the provisions of the eleventh section of the act of 1824. And it appearing by reference to the order of this court, dated the 17th day of June, 1846, that petitioner's petition has *been heretofore taken *pro confesso*, against L. Saunders, M. Harris, H. Hardesty, [*136 Ira Bowman, John Morgan, Josiah Benton, Z. S. Lyons, and

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Henry Hawford, and the said defendants not having entered their names to the said petition, or taken any steps to set aside the said order taking the petition *pro confesso*, it is further ordered and decreed that the petitioner recover the above-described land from the said defendants, unless the portions they may claim shall have been sold to them by the government of the United States, or otherwise disposed of by the said government to the said defendants; in which event the petitioner is to obtain relief in the manner above pointed out, where the government of the United States have sold or otherwise disposed of any portion of the land he claims.

“ Judgment rendered November 3d, 1846; judgment signed November 12th, 1846.

(Signed,)

THEO. H. McCaleb, *U. S. Judge.*”

From this decree the United States appealed to this court.

The cause was argued for the appellants by *Mr. Johnson* (Attorney-General), and by *Messrs. Brent* and *May*, for the appellee.

Mr. Johnson made the following points.

I. That the land in controversy, being within the limits of the territory ceded to the United States by France by the treaty of 30th of April, 1803, Spain had no authority to dispose of it, her title having passed to France by the treaty of St. Ildefonso of the 1st October, 1800, and, consequently, the grant in this case is void. *Foster and Elam v. Neilson*, 2 Pet., 253; *Lee v. Garcia*, 12 Pet., 511; and the 18th volume of State Papers.

II. That the act of Congress of the 26th March, 1804, section 14, having declared null, void, and of no effect, all grants made within said territory after the 1st of October, 1800, the act of 1844, extending the act of 1824 to said territory, is to be construed, among other things, with reference to said act, and is not to be considered as giving validity to any grants made after that date.

Mr. Johnson then gave a history of the country between the Mississippi and Perdido Rivers. The executive and legislative departments of the government always asserted that it passed to the United States under the Louisiana treaty, because Spain ceded Louisiana to France with the same limits which bounded the Province when France formerly possessed it, which limits

*137] *included the country in question. He referred to the correspondence between our ministers and M. Cevallos, the Minister of Foreign Relations, of Spain, in “State

Papers," Foreign Relations, Vol. II., pp. 629 to 660. Spain said this country did not belong to us, and retained possession of it until the year 1810. The rest of Louisiana was delivered to us in 1804. All grants, in order to be valid, must have emanated, after 1803, from the United States; and between 1801 and 1803 from the French government. This court has given this construction to the treaty. In the case of *Foster and Elam v. Neilson*, the court had only the American copy of the treaty of 1819 before it, which said that grants of land should be ratified and confirmed, implying that some act of ratification was to be done by our government after the treaty. But in the *Arredondo case*, the Spanish copy was produced, which said that the grants should remain ratified and confirmed. But this article only related to the Spanish side of the line, and had no application to what had been our side of the line since 1803. In *Garcia v. Lee*, the court confirmed its former decision, except so far as it was changed by the production of the Spanish copy of the treaty of 1819. We became proprietors of Louisiana in October, 1800. Consequently, all subsequent Spanish grants are void, like the grant now before us. The court below confirmed this grant, upon the ground that the act of Congress of 1824 imparted validity to it. This is the only question now to be argued; all the rest is settled law.

(*Mr. Johnson* then referred to and examined all the laws of Congress between 1804 and 1824, to show that they all considered such grants void.) The act of 1824 does not recognize such a grant as valid. The claimant must show that the grant under which he claims was *legally* made, which it was not; and he must show, also, that the inchoate would have ripened into a perfect title under the Spanish laws, which the present grant could not have done. He must show that the grant was protected by our treaty with France. But the date of the grant here is subsequent to the treaty, and to confirm it we should have to recognize Spain as the sovereign of the country. The only grants embraced within the act of 1824 are those made by Spain before 1800, or by France between 1800 and 1803. The act of 1844 did not go as far as that of 1824, because it only revived so much of it as was applicable. The state of the question was well known then, and Congress could not have intended to undo what they had been doing ever since 1804, when they declared all such grants void.

**Messrs. Brent and May*, for the appellee, con- tended,—

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1. That his title papers (not objected to in the court below) establish a sufficient title, under the laws of Spain, to entitle him to the benefits of the act of 26th May, 1824.

2. That the grant relied on was in itself a complete title prior to the 10th of March, 1804; and if not, then the claim set up might have been matured into a complete title, had not the country been transferred to the United States.

3. That the decree should be affirmed.

The act of 17th June, 1844, ch. 95 (5 Stat. at L. 676), revives so much of the act of 26th May, 1824, ch. 173 (4 Stat. at L., 52), as relates to the State of Missouri, for five years, and applies the law of 1824 to Louisiana, the same as it was enacted for Missouri.

By the act of 1844, ch. 95, therefore, the court has jurisdiction over land claims, originating with the Spanish, French, or British authorities, to the same extent that the court had under the Missouri law.

The act of 1824, ch. 173 (4 Stat. at L., 52), allows any person claiming lands in that part of the late Province of Louisiana which is now included within the State of Missouri, by virtue of any French or Spanish grant, concession, warrant, or order of survey, legally made, granted, or issued, before the 10th of March, 1804, by the proper authorities, to any person, &c., resident in the Province of Louisiana at the date thereof (meaning the date of the grant, &c.), or on or before the 10th of March, 1804, (meaning resident in Louisiana on or before the 10th of March, 1804,) which was protected or secured by the treaty between the United States of America and the French Republic, of the 30th April, 1803, and which might have been perfected into a complete title, under and in conformity to the laws, usages, and customs of the government under which the same originated, had not the sovereignty of the country been transferred to the United States. The act then proceeds to direct the manner of instituting suit, &c.

The facts connected with this very claim will be found fully reported by the Commissioner in the 18th volume of American State Papers (3d vol. on Public Lands), 59 and 66.

With a view to explain the rights secured by this act of 26th May, 1824, we will briefly examine the cases arising in this court in regard to Spanish claims; and more particularly, those decided under this very law.

Foster and Elam v. Neilson, 2 Pet., 254, was a petitory or possessory action brought by individuals against a possessor (under no special act of Congress), to recover lands lying

east *of the Mississippi River and west of the Perdido. It was brought to try the question whether that dis- [*139 trict of country passed to the United States under the treaty of Paris, dated 30th April, 1803, and if it did not so pass, then to raise the inquiry whether the Spanish grants made by Spain while she was *de facto* sovereign of all that district of country were not protected by the eighth article of the treaty of Washington, 22d February, 1819, by which Spain ceded to the United States the two Floridas.

On both these questions the court decided against the claimants. On the first, because the legislative and executive departments had precluded all inquiry into this purely political question by asserting our right to the territory under the treaty of 1803. (See 2 Pet., 307.) And on the second question, because the court, although divided on the effect of the eighth article of that treaty, (see 2 Pet., 313,) fully concurred in considering that treaty as practically securing no rights to Spanish claimants, until Congress should legislate for the purpose of executing its guarantees. (2 Pet., 314, 315.) And inasmuch as Congress had failed to confirm Spanish titles west of the Perdido, therefore no right could be set up at law under that treaty. (2 Pet., 315.) And the difficulty which in that case was insurmountable was, that, even if the treaty of 1819 protected the Spanish titles west of the Perdido, yet Congress had never repealed the fourteenth section of the act of 1804 (2 Stat. at L., 287). See 2 Pet., 317.

Now, as our land lies within the disputed territory, it is clear that we cannot recover unless Congress has, by the act of 1824, above recited, conferred new rights on the Spanish claimants. We shall contend that the act of 1824 is not meant to open the question whether the lands or territory in dispute passed to our government by the treaty of 1803, but, assuming that they did so rightfully pass, still to recognize those grants as entitled to respect, because made by the government *de facto*. And surely nothing could be more inequitable than for our government to repudiate grants made by Spain while in actual possession of the territory. with a claim to hold it rightfully.

Hence the act of 1824, § 2, enacts that the final decree shall "settle and determine the question of the validity of the title according to the law of nations, the stipulations of any treaty and proceedings under the same, the several acts of Congress in relation thereto, and the laws and ordinances of the government from which it is alleged to have been derived, and all other questions properly arising between the claimants and United States."

*140] *According to the law of nations, and regarding it alone as the basis of the decree, the grants of a government *de facto* are valid. In support of this position, we refer to *State of Rhode Island v. Massachusetts*, 12 Pet., 748; 12 Wheat., 535; 8 Wheat., 509; 6 Pet., 712, 734; 10 Pet., 330; *Id.*, 718; 8 Pet., 445; 9 Pet., 139; 5 Rob. Adm., 113; 1 Kent, Com., 177.

It will be seen by reference to history, and to the decision of this court, that the formal surrender to the United States was not made until the 20th of December, 1803, and that in fact the United States did not take possession until some time after. *Foster and Elam v. Neilson*, 2 Pet., 303.

That Spain was in possession of this territory in 1804 and later, and issued grants thereof, was recognized in *Keene v. McDonough*, 8 Pet., 310; *Pollard's Heirs v. Kibbe*, 14 Pet., 364. So that here was a *de facto* sovereignty certainly until the 20th of December, 1803.

On the 19th of November, 1803, the Spanish surveyor had returned the certificate of his location of the lands of Reynes, giving the boundaries and returning the appraisement or price to be paid, and certifying the delivery to the purchaser.

This alone was an inchoate title prior to a surrender of possession by Spain, which would *per se* entitle us to recover, as it recites an order of survey and is based on such order, because the order alone would be sufficient if it could be matured to a complete title under the Spanish laws as to the extent to which inchoate rights are protected. See *Mitchell v. U. States*, 9 Pet., 711; *Chouteau's Heirs v. U. States*, 9 Pet., 145; *Barry v. Gamble*, 3 How., 32.

But it will be observed that the act of 26th May, 1824, equally respects titles which have been completed under the Spanish authorities, prior to the 10th of March, 1804.

Congress have therefore virtually submitted the question to the courts, whether a grant like the one to Reynes (which was executed by Morales, 2d January, 1804) should, on the principles of equity or the law of nations, or the terms of "any treaty or any act" of Congress, be confirmed and respected.

It does not distinctly appear why Congress fixed the 10th of March, 1804, as the limit of inquiry, unless that was the period when possession of Louisiana by the United States was supposed to be consummated. This court have fixed the date of our possession of Louisiana to be in March, 1804. *Chouteau v. Eckhart*, 2 How., 373.

The fourteenth section of the act of 26th March 1804 (2 Stat. at L., 287), had annulled all Spanish grants subsequent

to *the treaty of St. Ildefonso in 1800, and doubtless Congress meant, by designating the 10th of March, [*141 1804, as the limit of inquiry, to admit the equity of all legal grants made by the authorities in possession, and even all inchoate rights originating prior to that day.

It cannot be possible that Congress designed by the act of 26th May, 1824, to submit grants, &c., made by Spain prior to the 10th of March, 1804, to the jurisdiction of the courts, merely to decide that Spain had no title to make such grants. We therefore regard the act of Congress as virtually admitting the title of Spain to make these grants up to the 10th of March, 1804. But even if the courts are to decide on the title of Spain, as well as the validity of the grant under her laws, then it is clear that the title of a *de facto* sovereign is sufficient.

Should it be contended that the words, "which was protected or secured by the treaty between the United States of America and the French Republic of the 30th April, 1803, and which might have been perfected into a complete title," &c., are restrictive of the class of claims to be adjudicated on, and designate only such claims as had originated at the date of that treaty, and exclude such claims as originated after that date and prior to the 10th of March, 1804, then we submit that such a construction would reject as idle and unmeaning all that part of the act which refers to orders of survey, grants, &c., made or issued prior to the 10th of March, 1804; for if grants or titles acquired subsequent to the treaty of 30th April, 1803, are not protected by its terms, then why designate the 10th of March, 1804, as the period anterior to which any order of survey, &c., might be considered and decided? Can it be that an order of survey made prior to the 10th of March, 1804, is to be considered merely to be rejected? Such a construction, without reason and in violation of the letter of the law, must be wholly untenable.

The treaty of Paris, by which the United States acquired Louisiana from France, will be found in 1 White's New Recopilacion, 196, and bears date on the 30th of April, 1803, by which it will be seen that France only ceded Louisiana "as fully and in the same manner" as she had acquired it by the treaty of St. Ildefonso. See Art. 1.

Now, whatever rights were acquired by France, it will be seen that the act of delivery by Spain only bears date the 30th of November, 1803, and was not deposited among the archives until the 28th of December, 1803. 2 White's New Recopilacion, 195, 196.

So that it is clear that France had no actual possession

*142] until *the 30th of November, 1803, nor did she transfer this possession to the United States until the 20th of December, 1803. 2 White's *Recopilacion*, 226. And even these transfers were mere paper transfers of possession, which in fact was not consummated until some time afterwards.

Art. 4th of this treaty provides for the sending of a French commissary thereafter, to deliver possession of Louisiana to the United States; and Art. 5th shows that the possession was not designed to be changed, or, in other words, that the treaty was not to go into effect until the exchange of ratifications. This exchange of ratifications did not take place until the 21st of October, 1803, so that rights which were inchoate prior to that day are secured by the treaty under its guarantees of property to the citizens. 12 Pet., 299.

If, therefore, the treaty be regarded as speaking from the exchange of ratifications, then our order of survey was expressly protected, being dated on 1st September, 1803, as recited in the return of survey and appraisement and delivery. These recitals are evidence. *U. States v. Arredondo*, 6 Pet., 729, 731; *U. States v. Clark*, 8 Pet., 448. See also this order of survey, 18 American State Papers, 59; 3 Story on Const., § 1507; Rawle on Const., 56, 57; Vattel, §§ 156, 208.

It will be seen that no objections were taken below to the petitioner's evidence, or the facts recited therein. Then there is proof in this cause of an inchoate title expressly protected as property by the treaty, speaking from the date of its ratification, 21st October, 1803; and if so, the cause is ended.

But if we are wrong in this, then we contend that the third article of the treaty, which declares that, "in the mean time, they (the inhabitants) shall be maintained and protected in the free enjoyment of their liberty, property, and religion," was designed, not only to protect existing grants, but such property as might, in the mean time, be lawfully acquired, either by purchase from individuals, or the government *de facto*.

The right to acquire property may be said to be property; and inasmuch as the United States were not in a condition to grant the public domain until the 20th of December, 1803, or after that time, the treaty must be equitably construed as protecting, prospectively, property acquired from Spain, while her laws were lawfully in force. Otherwise, rights arising under those laws would be disregarded, while the laws were held valid, and binding on the inhabitants. In support of these views we refer to the case of *Delassus v. The United States*, 9 Pet., 131; but more earnestly to the case of *Smith v. The United States*, 10 Pet., 330.

*Our grant being signed by Morales, the Governor and Intendant of Louisiana, as proved by Mazureau, [*148 and by Bouligny, there can be no question about his power to make such a grant, as this court has already decided. 2 How., 374; 4 How., 460. Also, 6 Pet., 714 and 723, 724, 727.

The case of *Arredondo v. The United States*, 6 Pet., 691, was instituted under the sixth section of the act of 23d May, 1828. The sixth section of this law will be found in the note to 6 Pet., 707; by which it appears that the Arredondo claim, which contained more land than the commissioners were authorized to decide on (they being limited to a league square, 6 Pet., 706), depended on this very act of 26th May, 1824, which was, in such cases, applied to Florida. See 6th section, recited in 6 Pet., 707, 708. In that case the court say, that the case, as presented under the act of 1824, assumes a very different aspect (from that of *Elam and Foster v. Neilson*),—that the ownership of the land, by the United States or the claimant, is to be considered as a “purely judicial question,” and to be decided “as between man and man.” 6 Pet., 712.

And in that very case, the court proceeded to confirm the claim, by regarding the treaty of cession, not as requiring further legislation to confirm the claims, but as of itself, and by itself, the basis of a valid title.

Next in order is the case of *The United States v. Percheman*, 7 Pet., which is only material as establishing that the decision in *Elam and Foster v. Neilson* would have been different if the Spanish copy of the treaty of 1819 had been before the court (see 7 Pet., 89); and as being a case in which the Spanish claim was established substantially under the act of 26th May, 1824, which was applicable to the case. See 7 Pet., 84, 85.

Garcia v. Lee, 12 Pet., 515, was a case not instituted under any act of Congress, but, like *Foster and Elam v. Neilson*, involved the right of Spain to grant titles in that part of Louisiana east of the Mississippi River; and it was held, that the grant, being by Spain in 1806, was to be disregarded, under the principles of *Foster and Elam v. Neilson*.

Les Bois v. Bramell, 4 How., 463, considers the confirmation of a Spanish claim by a Board of Commissioners, or by Congress directly, or by the District Courts, by force of the act of 1824, as a location of land, by a law of the United States.

Mr. Justice DANIEL delivered the opinion of the court.
The petitioner in the court below, as the heir of José

Reynes, claimed under a grant from the government of Spain, *144] forty thousand arpents of land, lying within what was formerly the district of Baton Rouge, now making portions of the parishes of East Feliciana and St. Helena in the State of Louisiana. The documents upon which this claim is asserted, so far as the formalities entering into the creation of a complete title under the Spanish government are requisite, appear to be regular, and to have been admitted in evidence without exception. No exception either has been taken to the verity of the signatures and certificates appended to those documents, or to the truth of the official position of the agents by whom those signatures and certificates have been made. The questions arising upon this record grow out of considerations beyond the mere facts admitted as above mentioned, considerations involving the powers of the agents, whose acts are relied on, as affected by the treaties, by the political sovereignty, and by the legislation of the United States.

The petition in this case, if not by its own terms, has, by the arguments adduced in its support, been rested upon the act of Congress of May 26, 1824, (reënacted by the act of June 17, 1844, and extended in its operation to claims originating with either the Spanish, French, or British authorities,) by which act it seems to be supposed that, beyond the mere permission therein given to proceed against the United States as defendants in their own courts, some essential rights in the subjects of pursuit have been originated or superinduced on behalf of claimants,—rights which but for the law of 1824 could not have existed. The character of this hypothesis requires particular examination, as upon its correctness or its fallacy must depend the fate of this claim, and of every other similarly situated. Pursuing this theory, it is insisted that the petitioner (the defendant in error here), as the heir of a purchaser for valuable consideration from the Spanish authorities, and holding the evidences of a perfect title from those authorities, is now permitted to show that he falls within the class of persons whose rights have been protected, both by the treaty of St. Ildefonso, between Spain and France, of the 1st of October, 1800, and by the treaty of Paris between France and the United States, of the 30th of April, 1803, and who are specially referred to and provided for in the act of 1824. In answer to this pretension of right under the act of 1824, it might perhaps be sufficient to observe, that, if this right be asserted in virtue of a perfect Spanish title, it would seem to be comprised neither within the mischief nor the remedy contemplated by the statute.

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The mischief intended to be provided for by the act of 1824 was the inchoate or incomplete condition of titles having a fair *and just and legal inception under either the French or Spanish governments of Louisiana, but [*145 which, by reason of the abdication or superseding of those governments, and by that cause only, had not been completed. The remedy was the permission to bring such titles before the courts of the United States, and there to render them complete, and to establish them by proof of the legality and justice of their origin and character. Such, then, being the mischief declared, and such the remedy provided by the statute, it is difficult to perceive the reason or the authority for bringing before the courts merely for supervision titles alleged to be already perfected under the unquestionable and competent authority of either Spain or France. With regard to titles so derived and so consummated, there is no provision made by the statute. None could be requisite; and there could, with reference to such titles, be nothing for the courts to act upon, nothing which it was competent for them to consider. Conceding for the present that the title before us has not been completed, the inquiry presents itself, whether in other respects it corresponds with the description of claims authorized by the law to be brought before the courts for completion and establishment. Amongst the requisites demanded for these titles by the statute are the following. They shall be legally granted, by the proper authorities, to persons resident within the Province of Louisiana at the time, or on or before the 10th day of March, 1804; that they should be such claims as were protected or secured by the treaty between the United States and the French Republic of the 30th of April, 1803, and which might have been perfected into complete titles under and in conformity to the laws, usages, and customs of the government under which the same originated, had not the sovereignty of the country been transferred to the United States. With regard to the modes of proceeding by which these claims are to be brought before the courts, the statute next prescribes that it shall be by petition setting forth fully and plainly the nature of the claim to the lands, &c., particularly stating the date of the grant, concession, warrant, or order of survey, under which the claim is made, by whom issued, &c.

By the second section of the statute it is enacted, that every petition which shall be prosecuted under its provisions "shall be conducted according to the rules of a court of equity, except that the answer of the District Attorney of the United States shall not be required to be verified by his

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oath,—and the said court shall have full power and authority to hear and determine all questions arising in said cause, relative to the title of the claimant, the extent, locality, and boundaries of the *claim, or other matters connected *146] therewith, fit and proper to be heard and determined, and by a final decree to settle and determine the question of the validity of the title, according to the laws of nations, the stipulations of any treaty, and proceedings under the same, the several acts of Congress in relation thereto, and the laws and ordinances of the governments from which it is alleged to have been derived.”

In part compliance with the act of Congress, the petitioner alleges, that his father acquired the land claimed (now situated within the parishes of East Feliciana and St. Helena in the State of Louisiana) by purchase and grant from Juan Ventura Morales, the duly authorized officer and agent of the Spanish government, the then sovereignty over the territory in which the said land is situated, at the time of the purchase and grant; and that Morales had full authority from the government of Spain to sell the said land, and to grant a good and perfect title thereto. The petitioner goes on to allege, a survey made and returned by the duly authorized officer of the Spanish government, on the 19th day of November, 1803; payment of the purchase-money, on the 30th of December, 1803, and the emanation or issuing of the grant to the father of the petitioner, on the 2d of January, 1804. In support of the petition there are made exhibits, the certificates of the deputy and principal surveyors, Pintado and Trudeau, and the grant from Morales to the father of the petitioner, for the land in question; these documents respectively correspond in dates with the allegations of the petition.

Upon the foregoing allegations and documents it is insisted for the defendant in error, that by operation of the acts of 1824 and 1844 already cited, and by virtue of stipulations in the treaties of St. Ildefonso and of Paris, and by the rules of the law of nations as applicable to those treaties, his rights to the land granted by Morales to his father have been protected, and that the petitioner is entitled thereto, as adjudged to him by the District Court.

With respect to that interpretation of the acts of Congress which would expound them as conferring on applicants new rights not previously existing, we would remark that such an interpretation accords neither with the language nor the obvious spirit of those laws; for if we look to the language of the act of 1824, we find that the grants, surveys, &c., which are authorized to be brought before the courts, are those only

which had been legally made, granted, or issued, and which were also protected by treaty. The legal integrity of these claims (involving necessarily the competency of the authority *which conferred them) was a qualification associated [*147 by the law with that of their being protected by treaty. And as to the spirit and intention of the law, had it designed to create new rights, or to enlarge others previously existing, the natural and obvious means of so doing would have been a direct declaration to that effect; certainly not a provision placing these alleged rights in an adversary position to the government, to be vindicated by mere dint of evidence not to be resisted. The provision of the second section of the act of 1824, declaring that petitions presented under that act shall "be conducted according to the rules of the court of equity," should be understood rather as excluding the technicalities of proceedings in courts, than as in any degree varying the rights of parties litigant; as designed to prevent delays in adjudicating upon titles, as is further shown in another part of the same sentence, where it is declared that these petitions shall be tried without continuance, unless for cause shown. The limitations, too, maintained as to the character of claims and that imposed upon the courts in adjudicating upon them, is further evinced in that part of the same section which says, that the court shall hear and determine all questions relative to the title of the claimants, the extent, locality, and boundaries of the claim, and by final decree shall settle and determine the questions of the validity of the title, according to the law of nations, the stipulations of any treaty, and proceedings under the same, the several acts of Congress, and the laws and ordinances of the government from which it is alleged to have been derived. In some aspects of these claims, they were properly to be denominated equitable. They were to be equitable in the sense that they should not be inequitable or wrongful,—that they should be rightful, and founded in justice; and they were necessarily to be equitable in so far as they were incomplete, and could not therefore be maintained as perfect legal titles. But in no proper acceptation could they be called equitable titles, as implying any addition to their strength or any diminution of the rights of the United States, as affected by the statute.

We come now to the inquiry, whether the grant in question was protected either by the treaty of retrocession from Spain to the French Republic, or by the treaty of Paris, by which the Territory of Louisiana was ceded to the United States. The treaties above mentioned, the public acts and proclamations of the Spanish and French governments, and those of

their publicly recognized agents, in carrying into effect those treaties, though not made exhibits in this cause, are historical and notorious facts, of which the court can take regular judicial *148] notice; and reference to which is implied in the investigation before us.

It is proper in this place again to refer to the date of the certificate of survey on which the grant in question was issued, and to that of the grant itself. The former purports to have been given on the 19th day of November, 1803, the latter to have been issued by Morales on the 2d of January, 1804. The dates of the treaties of St. Ildefonso and of Paris have already been mentioned,—that of the former being the 1st of October, 1800, that of the latter the 30th of April, 1803. In the construction of treaties, the same rules which govern other compacts properly apply. They must be considered as binding from the period of their execution; their operation must be understood to take effect from that period, unless it shall, by some condition or stipulation in the compact itself, be postponed. Were it allowable at this day to construe the treaty of St. Ildefonso as not being operative from the signature thereof, its operation could by no construction be postponed to a period later than the 21st of March, 1801, at which time, by the treaty negotiated by Lucien Bonaparte and the Prince of Peace, Spain accepted from the French Republic the Grand Duchy of Tuscany in full satisfaction of the provision stipulated in favor of the Duke of Parma: or at the farthest, the government of Spain must be concluded, as to satisfaction of the stipulation above mentioned, by the royal order issued at Barcelona on the 15th of October, 1802, announcing from the king to his subjects the retrocession of Louisiana, and giving orders for the evacuation of the country by all Spanish authorities, and its delivery to General Victor, or any other officer authorized by the French Republic to take possession. In obedience to this order, formal possession was on the 30th of November, 1803, delivered by Salcedo and Casa Calvo, the Spanish Commissioners, to Laussatt, the Prefect and Commissioner of the French Republic. The treaty between the United States and the Republic of France contains no article or condition by which its operation could be suspended. It declares that the Republic, in pursuance particularly of the third article of the treaty of St. Ildefonso, has an incontestable title to the domain and to the possession of the territory, and cedes it to the United States in the name of the French Republic for ever, and in full sovereignty, with all its rights and appurtenances. This treaty therefore operated from its date; its subsequent ratification by the American government,

and the formal transfer of the country to the American Commissioners on the 20th of December, 1803, have relation to the date of the instrument. The rights *and powers of sovereignty, on the part of Spain, over the territory, ceased [*149 with her transfer of that sovereignty to another government; it could not exist in different governments or nations at the same time. The power to preserve the peace and order of the community may be admitted to have been in the officers previously appointed by Spain, until the actual presence of the agents of the succeeding government; but this would not imply sovereign power still remaining in Spain,—for if she continued to be sovereign after expressly conceding her sovereignty to another government, she might still rightfully resist and control that government; for sovereignty from its nature is never subordinate. She might, if still sovereign, notwithstanding her treaty stipulations with France, have ceded the entire territory to some other nation. That the government of Spain never supposed that any sovereign authority was retained by it after the cession to France, is apparent from the character of the treaty itself, and of the acts of the Spanish government carrying that treaty into effect. It is a somewhat curious fact, that there is not in this treaty a single stipulation or guarantee in favor of the lives or the property of the subjects or inhabitants of the ceded country, much less a reservation of power to grant or invest new rights within that territory. The same characteristic is observable in the royal order announcing the cession, and also in the formal act of delivery of the territory. So far from containing any such stipulation or reservation, the language of his Catholic Majesty may correctly be understood as conveying an acknowledgment that he had made no condition or stipulation whatever in behalf of his late subjects, and had no power to insist on anything of the kind; but had handed them over to the justice or the liberality of the new government to whom he had transferred them. Thus, in the order of Barcelona, after announcing the cession of the territory, and directing the collection of all the papers and documents relating to the royal treasury, and to the administration of the colony of Louisiana, in order to bring them to Spain for the purpose of settling the accounts; and an inventory of all artillery, arms, ammunition, effects, &c., which belong to him; and an appraisement of them in order that their value might be reimbursed him by the French Republic, he uses this language:—"Meanwhile, we hope, for the tranquillity of the inhabitants of said colony, and we promise ourselves, from the sincere amity and close alliance which unite us to the government of the Repub-

lic, that the said government will issue orders to the governor and other officers employed in its service, that the ecclesiastics *150] and religious houses employed in the service of the *parishes and missions may continue in the exercise of their functions, and in the enjoyment of their privileges and exemptions, granted to them by the charters of their establishments. That the ordinary judges may, together with the established tribunals, continue to administer justice according to the laws and customs in force in the colony. That the inhabitants may be protected in the peaceful possession of their property. That all grants of property, of whatever denomination, made by my governors, may be confirmed, although not confirmed by myself. I hope further that the government of the Republic will give to its new subjects the same proofs of protection and affection which they have experienced under my dominion."

This order from the king is an explicit admission of what the treaty itself exposes; namely, that no special stipulation had been made for the protection either of persons or property; that he regarded his own authority and the dominion of Spain over the territory as at an end, and that his sole reliance for the protection and welfare of his late subjects, and even for enforcing the grants he himself, through his officials, had made to them, was on the justice and benevolence of the new government. So far as the acts of the king of Spain are to be considered in connection with the territory and its inhabitants ceded by him, he appears to have committed both to those practices and to that discretion which obtain in civilized communities, wholly uninfluenced by any pledge or condition exacted by himself.

The proclamation of the Spanish provincial officers is almost a literal repetition of this royal order. The treaty of St. Ildefonso, then, can, by no rule or principle deducible from the laws of nations, be interpreted as still reserving to Spain, after the signature of that treaty, the power to grant away the public domain; for she could have had no right to calculate upon the *mala fides* of the French Republic with regard to the provision for the Duke of Parma, and to make such calculation an excuse for *mala fides* on her own part. But surely no right, under any pretext, to grant the public domain, could exist in Spain after the treaty of Aranjuez of March 21st, 1801, between that country and France, by which the Grand Duchy of Tuscany, that had been previously ceded to the French Republic was accepted by Spain in full satisfaction of the provision agreed to be made for the Duke of Parma. And least of all could such a power con-

tinue in the government of Spain after the royal order of the 15th of October, 1802, proclaiming the retrocession of the Territory of Louisiana and the fulfilment or satisfaction, of course, of all treaty stipulations in reference *to that territory; and all this, too, promulgated under the sig- [*151 nature of the king himself.

It may now be properly asked, What, then, are the grants, titles, or other rights protected by the third article of the treaty between the United States and the French Republic, of the 30th April, 1803, and by the acts of Congress of 1824 and 1844, referring to that treaty, and to previous acts of the Spanish government? The third article of the treaty of Paris of 1803 is in these words:—"The inhabitants of the ceded territory shall be incorporated in the union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess." The term *property* in this article will embrace rights either in possession or in action; property to which the title was completed, or that to which the title was not yet completed; but in either acceptance, it could be applied only to rights founded in justice and good faith, and based upon authority competent to their creation. The article above cited cannot, without the grossest perversion, be made either to express or imply more than this. According to this just and obvious rule of interpretation, the treaty of Paris, of April 30th, 1803, by any reference it could be supposed to have to titles or claims derived from Spain, could embrace such only as had their origin whilst Spain was the rightful sovereign over the territory; a period which, by the most liberal extension of her power, cannot be carried farther than the 15th of October, 1802, the date of the royal order of Barcelona. Indeed, if not from the date of the treaty of St. Ildefonso, yet certainly from the 21st of March, 1801, grants by Spain of the public domain in Louisiana would have been frauds upon the French Republic, since by the treaty of Aranjuez, of the date last mentioned, full satisfaction of the terms stipulated for the Duke of Parma was acknowledged by Spain. Looking more particularly to the documents on which this claim is founded, we find it recited in the certificate of Pintado, that the land in question had been surveyed by him in obedience to a decree of the General Intendancy of the Province, under date of the 1st of September, 1803. This decree

is not produced in evidence, but, upon the supposition that it was in the record and properly verified, the question of the competency of the authority to order it would stand precisely as it does in its absence. Turning next to the grant *152] itself, there are, in addition to the fact of *the date of that instrument, other circumstances disclosed upon its face, showing not only the want of authority in the grantor to make a good title, but which bring home to the grantor and to the individual soliciting the grant full knowledge that the title to whatever might be properly considered Louisiana, at least, no longer remained in the Spanish government. The grant is dated at New Orleans. It recites the application of Reynes for 40,000 arpents of land, to be paid for in letters of credit formerly issued by the provincial government, and then goes on to state, that, in consequence of the petition, Morales had caused a certified copy of the letter addressed by that Intendancy to the Commissioners appointed for the transfer of the Province of Louisiana, to be submitted, with the petition, to the Solicitor of the Crown. This document, then, excludes all doubt as to the knowledge of the parties of the cession to the United States of Louisiana by whatever might have been its real boundaries. It is signed by Morales, not as being an officer of the Territory of Louisiana, but as Intendant of the Province of West Florida, after Louisiana had passed to two sovereign states since its possession by Spain, and after actual possession had been delivered to the United States. It is clear, then, that the documents exhibited and relied on by the appellee could by their own terms convey no title within the Territory of Louisiana. Superinduced upon our conclusions drawn from the treaties above mentioned, and from the laws of nations applicable to their construction, is the positive legislative declaration in the act of Congress of March 26, 1804, "pronouncing all grants for lands within the territories ceded by the French Republic to the United States by the treaty of the 30th of April, 1803, the title whereof was at the date of the treaty of St. Ildefonso in the crown, government, or nation of Spain, and every act and proceeding subsequent thereto, of whatsoever nature, towards the obtaining of any grant, title, or claim to such lands, under whatsoever authority transacted or pretended, be, and the same are hereby declared to be, and to have been from the beginning, null, void, and of no effect in law or equity." This act of 1804 explicitly avows the opinion of the government of the United States as to any power or right in Spain at any time after the treaty of St. Ildefonso. It covers the whole subject of

grants, concessions, titles, &c., derived from Spain at any time subsequent to the treaty, stamping upon all such grants, &c., the most utter reprobation; denying to them any validity or merit, either legal or equitable. This act of 1804 has never been directly repealed. It still operates upon all the grants, concessions, &c., embraced within its *pro- [*153visions, except so far as these provisions may be shown to have been modified by posterior legislation. And it has been invariably held, and indeed must follow of necessity, that imperfect titles derived from a foreign government can only be perfected by the legislation of the United States. But it is argued for the appellee, that as the land in dispute did not lie within the territory of which France obtained from Spain actual occupancy, or of which the United States ever obtained a like occupancy until possession thereof was taken under the proclamation of President Madison, of October 10th, 1810, and as the Spanish authorities in the mean time, as a government *de facto*, retained possession, they could in this character invest their grantees with inchoate or equitable rights, which, under the privileges bestowed by the acts of 1824 and 1844, might be matured into perfect titles as against the United States. Without stopping to remark upon the caution which should ever be manifested in the admission of claims which, if not founded in violence or in mere might, yet refer us for their origin certainly not to regular unquestioned legal or political authority, it may be safely said, that claims founded upon the acts of a government *de facto* must be sustained, if at all, by the nature and character of such acts themselves, as proceeding from the exercise of the inherent and rightful powers of an independent government. They can never be supported upon the authority of such a government, if shown to have originated in a violation of its own compacts, and in derogation of rights it had expressly conceded to others. Every claim asserted upon wrong, such as this latter position implies, would be estopped and overthrown by alleging the compact or concession it sought to violate. Thus, if Spain, by the treaty of St. Ildefonso, did in truth cede to France the lands lying between the Mississippi and Perdido, she could not as a government *de jure* or *de facto*, without the assent of the United States, possessing all the rights of the French Republic, make subsequent grants of the same lands either to communities or to individuals. Her grants could not be regarded as the inherent, competent, and uncommitted proceedings of an independent government *de facto*; they would be met and made null by her own previous acknowledgment.

Whether, by the treaties of St. Ildefonso and of Paris, the territory south of the thirty first degree of north latitude, and lying between the Mississippi and Perdido, was ceded to the United States, is a question into which this court will not now inquire. The legislative and executive departments of the government have determined that the entire territory *154] was so *ceded. This court have solemnly and repeatedly declared, that this was a matter peculiarly belonging to the cognizance of those departments, and that the propriety of their determination it was not within the province of the judiciary to contravene or question. See the cases of *Foster and Elam v. Neilson*, 2 Pet., 253, and of *Garcia v. Lee*, 12 Pet., 511. In the former case the court say,—“If a Spanish grantee had obtained possession of the land in dispute, so as to be the defendant, would a court of the United States maintain his title under a Spanish grant made subsequent to the acquisition of Louisiana, singly on the principle that the Spanish construction of the treaty of St. Ildefonso was right, and the American construction wrong? Such a decision would subvert those principles which govern the relations between the legislative and judicial departments, and mark the limits of each.” Substituting the United States as a defendant in the place of a private litigant, (a privilege permitted by the law of 1824,) the case supposed and satisfactorily answered in the quotation just made is in all its features precisely that now before the court; and to sustain the pretensions of the appellee, it is indispensable that the American construction of the treaty of St. Ildefonso be rejected, and the Spanish construction held to be the true one. In the case of *Garcia v. Lee*, this court say,—“The controversy in relation to the country between the Mississippi and Perdido Rivers, and the validity of the grants made by Spain in the disputed territory after the cession of Louisiana to the United States, were carefully examined, and decided, in the case of *Foster and Elam v. Neilson*. The Supreme Court in that case decided, that the question of boundary between the United States and Spain was a question for the political department of the government; that the legislative and executive branches having decided the question, the courts of the United States are bound to regard the boundary determined by them to be the true one. That grants made by the Spanish authorities of lands which, according to this boundary line, belonged to the United States, gave no title to the grantees in opposition to those claiming under the United States.” Has the law, as expounded in the cases of *Foster and Elam v. Neilson*, and of

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Garcia v. Lee, been in any respect changed by the act of 1844? Has that act enlarged the rights of claimants under French or Spanish titles, or restricted the rights of the United States as derived from the treaties of St. Ildefonso and of Paris? Beyond an extension of the modes of proceeding allowed by the act of 1824 to claimants in Missouri, to persons claiming under Spanish, French, or British titles, within the States of *Louisiana and Arkansas, and [*155 within those portions of the States of Mississippi and Alabama lying south of the thirty-first degree of north latitude, and between the Rivers Mississippi and Perdido, we can perceive no change in the act of 1824 effected by the act of 1844. We are unable to perceive any addition made by the latter act to the intrinsic strength of the claims allowed to be prosecuted, or any dispensation from proofs of their *bona fides*, or of a single condition prescribed in relation to their origin and character by the act of 1824. What are the conditions prescribed by this act as indispensable to the allowance and establishment of titles derived from France or Spain has been stated in a previous part of this opinion, and having shown the title of the appellee to be wanting in all those conditions, it is the opinion of this court that his petition should have been rejected,—and therefore that the judgment of the District Court pronounced in this cause should be reversed, and the same is hereby reversed.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Louisiana, and was argued by counsel. On consideration whereof, it is the opinion of this court, that the title of the petitioner is null and void. Whereupon it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby, reversed, and that this cause be, and the same is hereby, remanded to the said District Court, with directions to dismiss the petition of the claimant in this cause.

RENE LA ROCHE AND MARY, HIS WIFE, INEZ R. ELLIS, STEPHEN P. ELLIS, AND THOMAS LA ROCHE ELLIS, MINOR HEIRS OF THOMAS G. ELLIS, DECEASED, BY THEIR GUARDIAN AD LITEM, CHARLES G. DAHLGREN, PLAINTIFFS IN ERROR, v. THE LESSEE OF RICHARD JONES AND WIFE.

After the cession by Georgia to the United States, in 1802, of all the territory north of 31° north latitude and west of the Chatahoochee River, Congress passed an act (2 Stat. at L., 229) confirming certain titles derived from the British or Spanish governments, and appointing commissioners to hear and decide upon such claims, whose decision was declared to be final.

In 1812, another act was passed (2 Stat. at L., 765) confirming the titles of those who were actual residents on the 27th of October, 1796, and whose claims had been filed with the Register and reported to Congress.

*156] *A grant of land on the north side of latitude 31, issued in 1789 by the Governor-General of Louisiana and West Florida, was void, because the United States owned all the country to the north of latitude 31, under the treaty of 1782. Consequently, no title to land so granted could pass by descent.¹

But the subsequent legislation of Congress conferred a title emanating from the United States, and vested it in the person to whom the commissioners awarded the land.

This title is conclusive against the government, and a court of law cannot now inquire into previous facts, in a collateral action, with a view of impeaching that title. It is equivalent to a patent.

THIS cause was brought up, by writ of error, from the Circuit Court of the United States for the Southern District of Mississippi.

It was an ejectment brought by Richard Jones and wife, against the plaintiffs in error, to recover eight hundred acres of land in Wilkinson County, in the State of Mississippi.

The suit was brought in 1823, and in 1825 a verdict was rendered, by agreement, in favor of the plaintiff, subject to the opinion of the court upon the whole facts in the case. The judgment of the court below was in favor of the plaintiff.

The facts in the case are all recited in the opinion of the court, and need not be repeated.

It was argued by *Mr. Gilpin* and *Mr. Walker*, for the plaintiffs in error, and *Mr. Lawrence* and *Mr. Morehead*, for the defendants in error.

The counsel for the plaintiffs in error contended,—

It is incumbent on the plaintiff below to establish a right of possession of the tract in question, existing in himself, or

¹ CITED. *Robinson v. Minor*, 10 How., 644.

those under whom he claims, on the 6th of August, 1823, founded on a legal title; and it is immaterial, as to his right to recover, whether the title be in the defendants or not. *Love v. Simms*, 9 Wheat., 524; *Cincinnati v. White*, 6 Pet., 441.

Does the evidence of the plaintiff, in the record, exhibit such a title? It does not.

I. The plaintiff's evidence admits that William Cocke Ellis never was in possession of the tract in question. He left the Mississippi Territory in 1784 or 1785; went to Virginia; never returned from there; and died there in 1790. The certificate of survey of the tract in question bears date 11th February, 1789. This is the first evidence of his title. It is four or five years after he had left the Mississippi country and become a resident in Virginia. The existence of a previous warrant of survey is known only by a recital, unaccompanied with any description of the land, or any application for or receipt of it by him. There is no evidence of the knowledge, acceptance, or possession either of the warrant of survey or grant, or of the *tract of land itself, by any [*157 person for William Cocke Ellis, or by or on behalf of his child or wife.

It is admitted by the plaintiff's evidence that it was claimed and held by Richard Ellis in 1792; and by John Ellis, from whom the defendants claim, in 1795; both holding in, and asserting, their own right, adversely to the claim of the lessors of the plaintiff. These facts are fatal to the plaintiff's right of recovery. *Taylor v. Horde*, 1 Burr., 119; *Lewis v. Price*, 2 Saund., 175 (n.).

II. The claim, therefore, of Mary Jones (formerly Ellis,) the plaintiff's lessor, is made, for the first time, in 1823, and it rests exclusively on the alleged Spanish grant of 16th February, 1789, unaccompanied by any entry, possession, or previous claim. Even if it were not invalid on the grounds already stated, it would still be so, unless,—

1. The Spanish grant vested a valid title in William Cooke Ellis, her husband, which descended to her by act of law, or was devised to her by him. Or,

2. The compact between the United States and the State of Georgia, and the legislation of the United States consequent thereon, vested such a title in her.

Now neither of these occurred.

1. The Spanish grant vested no title.

It was an exercise of authority over territory not belonging to Spain, being north of 31° N. Lat. Whatever doubt existed before 1795 was removed by the treaty of that year,

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by which Spain admitted that line to be her northern boundary. (8 Stat. at L., 146.) Repeated judicial decisions sustain this, both of the courts of the United States and of Mississippi.

In the case of *Fletcher v. Peck*, 6 Cranch, 87, 142, the Supreme Court sustained the validity of a patent, granted by the State of Georgia, on the 13th January, 1795, for a body of land in Mississippi Territory north of 31° N. Lat.

In the case of *Harcourt v. Gaillard*, 12 Wheat., 523, a grant by a British Governor of Florida, after 1776, of a tract in the Mississippi Territory, north of 31° N. Lat. is held to be invalid as a foundation of title.

In the case of *Henderson v. Poindexter*, 12 Wheat., 530, the Supreme Court expressly declares that no Spanish grant, after the peace of 1782, of land in the Mississippi Territory, north of 31° N. Lat., has any validity, but that holders must depend exclusively on their titles derived under the laws of the United States.

In the case of *Ross v. Barland*, 1 Pet., 664, the Supreme Court says, that the treaty of 27th October, 1795, settled the *158] line of 31° N. Lat. as the boundary between the United States and Florida.

In the case of *Hickey v. Stewart*, 3 How., 760, the Supreme Court distinctly examined the question as to the validity of complete Spanish grants, made in the Mississippi Territory by Spain, previous to the 27th of October, 1795, and pronounced them absolutely void. It went further; it declared the territory to belong to Georgia up to 1802, and therefore that titles deduced from that State were alone valid.

In the case of *Pollard v. Files*, 2 How., 602, the Supreme Court laid down the same principle in regard to the Florida treaty. The United States claiming the whole country as far east as the Perdido as part of Louisiana, and therefore ceded to the United States by the treaty of 1803, the Supreme Court declared all grants which Spain made within that territory to be void, and the court says that this had been so often settled (referring to *Foster v. Neilson*, 2 Pet., 254, and *Garcia v. Lee*, 12 Pet., 515), that it was no longer open to controversy.

In the case of *Poole v. Fleeger*, 11 Pet., 210, the Supreme Court applied the same principle,—as one not admitting controversy,—in conflicting claims to territory between the States of North Carolina and Virginia; it held a grant of land within it, by North Carolina, to be intrinsically void.

In the case of *Nevitt v. Beaumont*, 6 How. (Miss.), 237, the same ground, as to the total nullity of Spanish grants of land

north of 31° N. Lat., is strongly affirmed; as it is in many other cases decided in that State.

The Spanish grant therefore gave no title to William Cocke Ellis. But if it did, his wife derived none from him either by limitation or conveyance. She could not claim by inheritance from her husband, for the Georgia law recognized no title whatever in her. The evidence she produces, not only fails to show any conveyance or devise to herself, but, on the contrary, it shows possession and assertion of adverse title, in 1792, in Richard Ellis, which he then asserted he had derived from William Cocke Ellis, and it admits a regular devise from Richard Ellis to John Ellis. Nor, if it could avail, is there any evidence whatever of descent, possession, or conveyance to her of this tract under the Spanish grant. Mary Jones, therefore, totally fails to establish any title under the Spanish grant to her husband.

2. Does she, then, show a title under the legislative acts either of Georgia or the United States?

That she must so do has been settled by repeated decisions.

*In the case of *Henderson v. Poindexter*, 12 Wheat., 530, the Supreme Court expressly held that, where a claimant claimed under a Spanish grant, north of 31° N. Lat., his title was utterly void unless it was confirmed by the compact between the United States and Georgia, or the acts of Congress of the 3d March, 1803, or 27th March, 1804 (2 Stat. at L., 229, 303). In 14 Pet., 405, will be found Judge Baldwin's statement of the point thus decided in *Henderson v. Poindexter*.

In the case of *Harcourt v. Gaillard*, 12 Wheat., 523, the Supreme Court decided that a British grant was equally unavailing to give title north of 31° N. Lat., but that it must be derived under the compact with Georgia or the acts of Congress.

In the case of *Hickie v. Starke*, 1 Pet., 98, the claimant produced a grant "legally and fully executed"; but the Supreme Court held it to be insufficient, and required that the person under whom the claim is made should come within the provisions of the compact between the United States and Georgia.

In the case of *Hickey v. Stewart*, 3 How., 760, the same doctrine is fully established, the previous cases being reviewed and confirmed.

The same rule has been established in regard to claims under the Louisiana and Florida treaties, though in those treaties there were confirmatory words in regard to the

validity of existing grants, not found in the treaty of 1795. But acts of Congress being passed to carry these treaties into effect,—boards of commissioners being appointed,—the Supreme Court have held that the claimant, notwithstanding his grant, must bring himself within these laws.

In the case of *Delacroix v. Chamberlain*, 12 Wheat., 601, the Supreme Court held a confirmation by the board of commissioners appointed under the act of Congress absolutely necessary.

In the case of *Foster v. Neilson*, 2 Pet., 314, the same point was decided, and Judge Baldwin (14 Pet., 411), while commenting on that case, and controverting some of its positions, regards this as established beyond a question.

In the cases of *Garcia v. Lee*, 12 Pet., 516–519, of *Pollard v. Files*, 2 How., 603, and of *Les Bois v. Bramell*, 4 How., 459, the rule is treated as one not open to question or dispute.

Has, then, Mary Jones shown a title under the acts of Congress, which declare what was requisite to give a title to land in the Mississippi Territory on 27th October, 1795?

*160] *What is thus required?

1. Certain matters of fact made by law essential.

2. A confirmation by the board of commissioners appointed under that law.

What are these matters of fact, and is there any evidence of them in favor of Mary Jones? They are set forth either in the compact with Georgia (1 Laws of the United States, 489), or the act of Congress to carry it into effect (2 Stat. at L., 229).

1. Actual residence on the 27th of October, 1795, in the Mississippi Territory, by the person in whose name the Spanish grant was issued, or the legal representative of such person.

2. Presentation of proof thereof to the Register.

Now, the whole evidence in the record, not only does not present this proof, but establishes the reverse. It shows,—

1. That William Cocke Ellis was dead before the 27th of October, 1795.

2. That Mary Jones was not his legal representative.

3. That, if she was his legal representative, she never, at any time, resided in the Mississippi Territory.

4. That she never presented any proof, or made any claim, before the Register or commissioners.

But if she had given evidence of these matters of fact, still this would give no title, unless her claim was presented to the board of commissioners, and confirmed to her, as being

such representative, and the person then entitled to the tract. The act of 3d March, 1803, makes their decision on all the matters of fact necessary to establish a title as final and conclusive. It also makes a certificate of confirmation issued by them equivalent to a patent to the person in whose favor it is given.

1. This is apparent from the language of the act. See act of 3d March, 1803, § 6 (2 Stat. at L., 230).

2. It is established by judicial decisions, as well such as directly relate to the Mississippi Territory, as those similarly made in other cases.

In the case of *Brown v. Jackson*, 7 Wheat., 240, the Supreme Court gave full force to the act of the commissioners in the Mississippi Territory.

In the case of *Ross v. Barland*, 1 Pet., 665, 666, the Supreme Court says that no particular form of certificate is required; that it is sufficient if the proof is satisfactory to the board; and that nothing more is needed than their certificate to entitle the party, in whose favor it is given, to a patent.

In the case of *Hickey v. Stewart*, 3 How., 761, the language of the Supreme Court to this effect is still more decisive.

*The same point has been repeatedly decided in [*161 other cases, arising under the decisions of other boards created for similar purposes. *Polk v. Wendell*, 9 Cranch, 99; s. c., 5 Wheat., 303; *Hoofnagle v. Anderson*, 7 Wheat., 217; *Patterson v. Winn*, 11 Wheat., 384; *Edwards v. Daly*, 12 Wheat., 206; *Voorhees v. United States Bank*, 10 Pet., 472.

Now, Mary Jones not only had received no such certificate,—not only had presented no such proof,—but the board have deliberately decided,—

1. That the proof is, in their opinion, conclusive, to show that John Ellis was the legal representative of William Cocke Ellis; the tract having been proved to be “legally conveyed” to him.

2. That John Ellis was entitled to the land, according to the proofs and requirements of the compact with Georgia, and the acts of Congress.

3. That John Ellis was entitled to a certificate of confirmation, which was duly reported to Congress.

4. And John Ellis actually received a certificate of confirmation, under which he and his heirs have continued to hold the tract ever since the year 1805; as had been previously the case, without interruption, from 1795.

III. Nor can the lessor of the plaintiff, Mary Jones, avail

herself of the possession of John Ellis, or those who claim under him, as enuring to her benefit.

It is shown by the facts to be an adverse possession. The tract was claimed by Richard Ellis as his own. It was so devised by him to John Ellis. It was so held by John Ellis. It was so presented to the board of commissioners. It was so confirmed and certified by them. It was so definitively confirmed and ratified by act of Congress.

There is no evidence whatever to show that any title, legal or equitable, in Mary Jones, was supposed to exist, or was in any manner recognized as existing, by the board of commissioners or by Congress. The law of Mississippi, at the time when this action of ejectment at law was instituted, positively declared that the perfect legal title was vested in John Ellis and his heirs, under the certificate of confirmation from the board of commissioners, ratified by Congress. Act of Mississippi of 28th June, 1822 (How. & Hutch. Miss. Dig., p. 599).

Legal title, therefore, in Mary Jones there was clearly none, derived from the possession of John Ellis, or the confirmation to him. If it could be plausibly urged,—which it cannot,—that an equitable interest was vested in or inured to her by *162] *virtue of such possession and confirmation, it is insufficient to maintain her present action, which must rest on her establishing a legal and possessory title, complete in herself, at the time her suit was instituted. *Robinson v. Campbell*, 3 Wheat., 212.

The counsel for the defendants in error contended,—

1st. That Richard Ellis never had any title by descent to this land, either from his son or grandson. Upon the death of William Cocke Ellis, in August, 1790, with a full and complete legal title to the land in question, so far as the government of Spain could grant it, it undoubtedly became vested in his only child and heir, Richard Cocke Ellis, and in his wife, Mary Jones. It is well known that, after the American Revolution, the United States, Spain, South Carolina, and Georgia succeeded to the disputes of Great Britain, France, and Spain, relative to the country in which the land in question is situated. South Carolina claimed the country under the grant to the Lords Proprietors; Georgia founded her claim on the commissions to her governor, Wright; and the United States claimed it as a conquest from the British Province of West Florida. Spain contended that it was a part of Louisiana, and as such ceded to her by the treaty of 1783.

South Carolina relinquished her claim by the treaty of
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Beaufort to Georgia. There being no other territory in the United States than that of some one of the confederated States, the general government very properly abandoned its claim, and recognized the complete title in Georgia, by taking a cession of the country from that State. It has always been held by every department of the government, that the title and jurisdiction over this country was in Georgia alone, until this act of cession; that Spain held the country, and exercised jurisdiction over it wrongfully, and that the treaty between the United States and that nation does not import to be a cession of territory, but the adjustment of a boundary between the two nations. This being the case, it is obvious that we must look to the laws of Georgia to define the rights growing out of the course of descent. The law of Georgia on this subject will be found in Marbury and Crawford's Digest of the Laws of Georgia, p. 217. The first section of the act referred to, after abolishing the distinction between real and personal estate of any person dying intestate, continues as follows:—"So that in case of there being a widow and children, or child, they shall draw equal shares thereof, unless the widow shall prefer her dower; in which event she shall have nothing further out of the real *estate than such dower; but shall, nevertheless, receive her pro- [*163] portionable part or share out of the personal estate. In case any of the children shall have died before the intestate, their lineal descendants shall stand in their place and stead: in case of there being a widow, and no child or children, or legal representatives of children, then the widow shall draw a moiety of the estate, and the other moiety shall go to the next of kin in equal degree, and their representatives. If no widow, the whole shall go to the child or children. If neither widow, child, or children, the whole shall be distributed among the next of kin in equal degree, and their representatives; but no representative shall be admitted among collaterals, further than the child or children of the intestate's brothers and sisters. If the father or mother be alive, and the child dies intestate, and without issue, such father (or mother, in case the father be dead, and not otherwise) shall come in on the same footing as a brother or sister would do. The next of kin shall be investigated by the following rules of consanguinity, that is to say: children shall be nearest; parents, brothers, and sisters shall be equal in respect to distribution, and cousins shall be next to them. The half blood shall be admitted to a distribution share of the real and personal estate, in common with the full blood." Act of 23d December, 1789.

From the above law, it is apparent that, upon the death of William Cocke Ellis, his widow and child, in the language of the act, drew equal shares of his estate.

The child, Richard Cocke Ellis, being entitled to one half the land in question, died an infant, without issue, and intestate, leaving a mother, but no father, brothers, or sisters. In such case the mother came in "on the same footing as a brother or sister would do." The rule prescribed for investigating the next of kin places children first, and then parents, brothers, and sisters. The infant R. C. Ellis, having no brothers, or sisters, or father, his mother, the present lessor of the plaintiff, succeeded him, and became his sole heir. The foregoing law continued in force over this country until the adoption of the ordinance of July 18th, 1787, for the government of the Territory of Mississippi, in 1798, and so far only as it may be considered modified by it, until March 12th, 1803, when the act of that date was passed, revised February 10th, 1806. See Hutch. Miss. Code, p. 623.

2dly. But the land in controversy is situated in the country which lies between the Mississippi and Chatahoochee Rivers, and between the 31st degree of north latitude to the south, and a line drawn from the mouth of the Yazoo River, due *164] east, to *the Chatahoochee on the north. This being within the acknowledged limits of the United States, although Spain held and exercised jurisdiction over it until the treaty of the 27th of October, 1795, it is conceded that it has been properly decided by this court that all grants of land by her were invalid, unless embraced within the provisions of some one of the statutes passed by the Congress of the United States. The first act bearing upon this subject is that by which Georgia ceded her western territory to the United States. That act provides, "that all persons who, on the 27th day of October, 1795, were actual settlers within the territory thus ceded, shall be confirmed in all the grants legally and fully executed prior to that day by the former British government of West Florida, or by the government of Spain." On the 3d of March, 1803, Congress passed "an act regulating the grants of land, and providing for the disposal of the lands of the United States south of the State of Tennessee"; and in March, 1804, a supplemental act was passed, both of which are commented upon at large in the case of *Henderson v. Poindexter's Lessee*, 12 Wheaton, 536, and need not be more particularly noticed at this point. In this case the court says, "It is not easy to resist the conviction, that the government has legislated on the idea that Spanish titles might be valid, though held by persons who

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were not residents of the country on the 27th of October, 1795."

In the subsequent case of *Hickie v. Starke*, 1 Pet., 94, the court remarks, "that the term *actual settler* seems to have been understood, in the case of *Henderson v. Poindexter*, as synonymous with resident of the country. That case, however, did not require that the precise meaning of the term should be fixed, and the court is disposed to think that a settlement made on the land by another person, who cultivated it for the proprietor, would be sufficient, though the proprietor should not reside in person on the estate, or within the territory." The settlement made in the case cited was on the 3d of December, 1795, by another person than the proprietor, but for him. "Had the settlement been made," says the opinion, "at the day required by the cession act, it would, we think, have satisfied the requisition of that act, and entitled the plaintiffs in error to the benefit of the condition."

It will be remembered that this was a suit in chancery, and dismissed for the want of jurisdiction, because Hickie did not show that his patentee was a settler on the 27th day of October, 1795. He afterwards, however, brought his action of ejectment upon his legal title, exhibiting a patent, dated 3d of April, 1794, issued by the Spanish governor of the Province of *Louisiana, and a certificate of the 10th of April, 1806, signed by the commissioners appointed [*165 under the acts of Congress of the 3d of March, 1803, and the supplemental act of the 27th of March, 1804, confirming to George Mather, from whom Hickie claimed, the said tract of land, by virtue of the articles of agreement and cession between the United States and the State of Georgia.

The case came again before this court, and may be found reported in 3 How., 750. The decree in chancery, which had been brought before this court for revision, and dismissed for the want of jurisdiction, on the ground before stated, was relied upon as a bar to the recovery in ejectment. This court decided it was no bar, and reversed the judgment of the Circuit Court. It will be borne in mind, that the patentee was not a resident of the territory, and did not cultivate the land by another at the period prescribed in the act of cession by Georgia, but that the first actual settlement was by his agent, Williams, on the 3d of December, 1795.

From these cases it may be considered as settled, that all Spanish grants legally and fully executed prior to the 27th of October, 1795, though the grantee was a non-resident of the territory, and had not cultivated the land by another, are

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valid, if laid before the commissioners for their action under the laws of 1803 and 1804, before referred to.

The grant which is the foundation of the present action was legally and fully executed prior to the 27th of October, 1795, but the grantee, William Cocke Ellis, seems not to have been in the country from about 1784 to 1785 up to the period of his death in 1790, and his widow, the present lessor of the plaintiff, never was in the country. In the absence of William Cocke Ellis, his survey seems to have been made, certified, and the grant issued upon it. His father or brother, John Ellis, probably acted as his agent. It is respectfully contended, that the act of confirmation to John Ellis inured to the benefit of the legal title, without vesting it in him. Without urging the impropriety of his disavowal of his fealty to his principal, if at any time he had acted as his agent, it may be assumed as established, that all the acts of Congress on the subject of grants within the disputed territory, which were legally and fully executed prior to the 27th of October, 1795, presuppose that the legal title was full and complete in the grantee. See 12 Wheat., 528, &c.; and *The Lessee of Pollard's Heirs v. Kibbe*, 14 Pet., 406, where it is said that "the articles with Georgia were in themselves a confirmation of titles within its provisions, protected by them *166] and confirmed by them." The *third section of the act of cession speaks of "grants herein before recognized." The act of the 3d of March, 1803, before cited, after providing for three other classes of claimants not embraced in the act of cession, establishes a board of commissioners for the confirmation of claims, and declares the legal effect of a certificate of confirmation of a grant fully executed to be "a relinquishment for ever, on the part of the United States, to any claim whatever to such tract of land." In the other cases, the holder of the certificate thereby becomes entitled to a patent for the land. See sixth section of the act of 1803. The act of 27th March, 1804, while in its third section it uses more comprehensive language, brings whatever additional claims may be embraced by it within the operation of the act of 1803, to which it was a supplement.

What, then, was the legal effect of the certificate of confirmation to John Ellis? We have shown that the legal title passed to Richard C. Ellis, the infant heir of William C. Ellis, and to his widow, now Mary Jones; and that, upon the death of Richard C. Ellis, his title passed to his mother, so that she became the legal proprietor of the land in question.

Under the act of the commissioners, there was no transfer of the legal title. The act itself did not purport to vest the

legal title. It amounted to a simple relinquishment of the claim of the United States, leaving the legal title where the law had previously vested it. If John Ellis should institute an action of ejectment, could he show such a legal title as would entitle him to recover? It is apprehended that it would scarcely be gravely argued that he could. He procured the relinquishment of the claim of the United States to a grant of land, legally and fully executed. That relinquishment must attach itself to the legal title, wherever that may be. It is based, it is true, upon the hypothesis, that such title was in him, but it has not the effect of vesting such title in him when it was in another. The confirmation inured to the benefit of the title, wherever it was. Had the title been inchoate, the act of confirmation would have entitled the claimant to have the legal title consummated in himself, by having a patent issued in his name. But even in such case it is supposed, upon a proper case made out, the real owner of such inchoate title, might, by a suit in chancery, obtain the relinquishment of such title. But whether this be so or not, both parties claiming under the same title, the act of confirmation must be united with the title, wherever it may be. The law declares what shall be the effect of the act of confirmation of a grant legally and fully executed. The grant is recognized as the legal title, and the act of *confirmation a mere relinquishment of the claim of [*167 the United States. The title draws to itself the relinquishment, and remains where it did before the act of confirmation.

The reasons for requiring full and complete grants to be laid before a board of commissioners are obvious, as justly remarked by this court in the case of *Henderson v. Poin-dexter's Lessees*. "The legislature," says the court, "was making provision for the sale of vacant lands within the ceded territory, and it was deemed necessary to ascertain the particular lands which were appropriated." The confirmation, in the name of John Ellis, of the grant made to William Cocke Ellis, effected all that was intended by the law. It ascertained the particular land which had been appropriated, and confirmed the title. It did not change the legal title, or transfer it from the person in whom it was vested to the one who procured the confirmation. The intention of the law was fulfilled, its object fully accomplished, and the confirmation inured to the benefit of the holder of the legal title, whoever he might be.

Mr. Justice CATRON delivered the opinion of the court.

The original suit out of which this writ of error arises was an action of ejectment, brought in the District Court of the United States for the District of Mississippi, at October term A. D., 1823, by John Doe, lessee of Richard Jones and Mary, his wife, citizens of Kentucky, against Thomas Ellis and Mary Ellis, to recover a tract of land in Wilkinson County in the State of Mississippi, alleged to have been originally granted by the Spanish government to William Cocke Ellis, by a patent dated 16th February, 1789. It was admitted that the defendants were in possession of the tract of land in question; and that the land described in the Spanish grant, and in the declaration in this suit, were the same.

The proceedings in the case, and the facts as exhibited in the evidence offered by the plaintiffs,—no evidence being offered by the defendants,—are as follows.

In the year 1773 or 1774 Richard Ellis removed from Amelia County, Virginia, to the Mississippi country, then claimed and occupied by Spain as part of Louisiana and West Florida, where he continued to reside till his death, in 1792.

Richard Ellis was accompanied by two sons,—John Ellis, the grandfather of the defendants, and William Cocke Ellis, who afterwards married Mary Jones, the lessor of the plaintiff.

John Ellis continued to reside in Mississippi till his death in 1808.

William Cocke Ellis returned to Virginia about the year *168] *1784 or 1785, and continued to reside there till his death, in 1790, never having gone back to Mississippi.

On the 11th of February, 1789, Trudeau, the Surveyor-General of Louisiana and West Florida, issued a certificate of survey, with a figurative plan, of a tract of land of eight hundred square arpents on Buffalo Creek in the district of Natchez, “in favor of Don William Cocke Ellis; the delimitation (measurement) having been made by virtue of the decree of his Excellency, Don Stephen Miro, Governor-General, under date of 20th March, 1783.”

On the 16th of February, 1789, a grant of the said tract, which was stated to adjoin land of John Ellis, was made to William Cocke Ellis by Governor Miro, “in order that, as his own, he might dispose and make use of it.”

The situation of the tract is north of the 31st degree of latitude, in the former county of Adams and present county of Wilkinson, in the State of Mississippi.

On the 2d of April, 1789, William Cocke Ellis, who was

then residing in Virginia, married Mary Cocke, afterwards Mary Jones, and lessor of the plaintiff.

In January, 1790, William Cocke Ellis and Mary, his wife, had a child born, who was named Richard Cocke Ellis.

In August, 1790, William Cocke Ellis died in Virginia, intestate; leaving his wife, Mary Ellis, and his child, Richard Cocke Ellis, surviving him, and residing in Virginia.

In April, 1791, the child Richard Cocke Ellis died in Virginia, an infant,

On the 17th of October, 1792, Richard Ellis (of Mississippi) made his will, wherein he devised to his son John Ellis the tract of land in question, and died shortly afterwards.

On the 2d of July, 1795, Mary Ellis (widow of William Cocke Ellis) married, in Virginia, Richard Jones, lessor of the plaintiff, and they continued to reside in Virginia.

On the 27th of October, 1795, by the treaty between the United States and Spain, the latter admitted the parallel of 31° N. Lat. to be the north boundary of the Spanish possessions,—as it had always been claimed to be by the United States since the treaty of peace in 1782, where it is so expressly declared (8 Stat. at L., 138).

On the 7th of April, 1798, an act of Congress established the Mississippi Territory, bounded on the south by 31° N. Lat., and constituted a board of commissioners to receive a cession from Georgia of her territory west of the Chatahoochee, and north of 31° N. Lat., and to adjust all differences in regard thereto (1 Stat. at L., 549).

*On the 24th of April, 1802, an agreement was made between the United States and Georgia, and a [*169 cession by Georgia of all claims to territory north of 31° and west of the Chatahoochee. It was therein expressly covenanted, that all persons who were, on the 27th of October, 1795, actual settlers within the territory ceded, should be confirmed in their grants made by the Spanish government before that day (1 Laws of the U. S., 489).

On the 3d of March, 1803, an act of Congress was passed (2 Stat. at L., 229) which provided that,—

1. All persons, and the legal representatives of persons, who were resident in the Mississippi Territory on the 27th of October, 1795, who had before then received from the British or Spanish government a warrant or order of survey, and who on that day actually inhabited and cultivated the land in the warrant, should be confirmed in their titles if they were twenty-one years of age, or heads of a family, at the date of the warrant.

2. All persons, and their legal representatives, who, at the

time of the Spanish evacuation in 1797, were twenty-one years of age, or heads of families, and actually inhabited and cultivated a tract of land in the Mississippi Territory, not claimed under the preceding section or any British grant, or the agreement with Georgia, should be entitled to a donation of such tract.

3. All persons, and their legal representatives, who, at the time of passing this act, were twenty-one years of age, or heads of a family, and inhabited and cultivated a tract of land in said territory not claimed as aforesaid, should be entitled to a preëmption right therefor.

4. All persons claiming lands by virtue of the preceding sections, or of a British grant, or under the agreement with Georgia, were required to file their claims and evidence with the Register, before the 31st of March, 1804, and if this was not done, all their right was forever barred.

5. Commissioners were appointed to ascertain the rights of persons claiming under the agreement with Georgia, or under this act; they were to hear and decide, in a summary manner, all matters respecting such claims; and to determine them; and their determination, so far as the right was derived under the agreement with Georgia or the acts of Congress, was declared to be final. They were to give certificates to claimants who should appear to them entitled, stating that they are confirmed in their titles thereto; which certificate, being recorded, was to be a relinquishment for ever of all claim on the part of the United States.

*170] Thereupon John Ellis presented and filed his claim to be confirmed in the tract of land in question.

By indorsement on the original Spanish grant in this case, it appears that it was duly recorded in the Register's book C of written evidence of claims, folio 534.

He also produced and filed the will of his father, Richard Ellis, dated 17th October, 1792, devising the tract to him.

On the 19th of June, 1805, his title thereto was absolutely confirmed, and a certificate of confirmation was issued by the commissioners "to John Ellis, for the tract mentioned in the Spanish grant, dated 16th February, 1789, to William Cocke Ellis," and which had been, as they certified, "legally conveyed to the said John Ellis."

On the 3d of July, 1807, the report of the commissioners was made to the Secretary of the Treasury, stating, among others, the confirmation of the tract in controversy to John Ellis; and on the 2d of January, this, with numerous other reports on the Mississippi land titles, was reported to Con-

gress. (See Gales & Seaton's documents, Public Lands, Vol. I., p. 868.)

On the 30th of June, 1812, an act of Congress was passed, which declared that all persons, and their legal representatives, claiming lands in the Mississippi Territory under British or Spanish warrants or orders of survey, granted before the 27th of October, 1795, who were actual residents on that day, and whose claims had been filed with the Register and reported to Congress, were thereby confirmed in the lands so claimed, and should receive patents. (2 Stat. at L., 765.)

On this state of facts, it was submitted to the Circuit Court whether the lessor of the plaintiff (Mary Jones) could recover; that court having pronounced her title legal and valid, judgment was rendered for the plaintiff, and the only question presented for our consideration is, whether that judgment was a proper conclusion of law on the facts agreed by the parties. That the grant of 1789, made by Miro, Governor-General of Louisiana and West Florida, was void for want of power in the Spanish authorities to grant lands north of the thirty-first degree of north latitude, is not open to controversy at this time. It was so held in *Henderson v. Poin-dexter*, 12 Wheat., 539, and again in the case *Hickey v. Stewart*, 3 How., 756, and the same doctrine has been affirmed in several other cases. It necessarily follows, that on the death of William Cocke Ellis in 1790, his infant son Richard took no title by descent; nor did the mother of Richard take any title by descent on the death of her son in 1791. Her right to recover must therefore *depend on the compact between the State of Georgia and the United [*171 States of 1802, or on the legislation of Congress. The compact only provided for persons who actually inhabited and cultivated the land claimed on the 27th of October, 1795, and the lessor of the plaintiff, not having done so, was not provided for; and, in the next place, Congress intended by the act of 1803 to confer United States titles on claimants, and to this end instituted a board of commissioners, with powers to adjudge on the facts, whether such claim as was recognized by the compact existed, and who the proper claimant then was, whether by assignment or otherwise; and, especially, to ascertain and decide whether the land claimed had been actually inhabited and cultivated by the person who preferred the claim, on the 27th of October, 1795. On the necessary facts being found to satisfy the compact, and the act of Congress, the land was adjudged to the applicant, and a certificate of the judgment was delivered to him; which, on being recorded, divested the title of the United States, and

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vested it in the individual in whose favor the judgment was given. And this title is conclusive as against the government; nor can a court of law inquire into previous facts, reaching behind the judgment given by the commissioners, thereby to impeach its validity; as this would be assuming jurisdiction to overthrow that judgment in a collateral action. As a source of individual title, the judgment and recorded certificate stand on the foot of a patent, and merge all previous requirements, and all future inquiry into such requirements, when the grant is relied on, as here, in defence of an ejectment. John Ellis's heirs having the conclusive legal titles, Mary Jones has no standing in court: and such, in effect, is the decision of *Hickey v. Stewart*. We deem the judgment then pronounced conclusive of the present controversy, and, for the reasons then given and here given, order, that the judgment of the Circuit Court be reversed, and that one be entered for the defendants below, and plaintiffs in error here.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs, and that this cause be, and the same is hereby, remanded to the said Circuit Court, with directions to enter a judgment in this cause in favor of the defendants in that court and plaintiffs in error here.



***172] *JOHN A. PERRINE, COMPLAINANT, v. THE CHESAPEAKE AND DELAWARE CANAL COMPANY, DEFENDANTS.**

The Chesapeake and Delaware Canal Company have no right under their charter to demand toll from passengers who pass through the canal, or from vessels on account of the passengers on board.

The articles upon which the company is authorized to take toll are particularly enumerated, and the amount specified. The toll is imposed on commodities on board of a vessel passing through the canal.

No toll is given on the vessels themselves, except only when they have no commodities on board, or not sufficient to yield a toll of four dollars. Passengers are not mentioned in the enumeration, nor is any toll given upon a vessel on account of the persons or passengers it may have on board.

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A corporation created by statute is a mere creature of the law, and can exercise no powers except those which the law confers upon it. The canal company is not the absolute owner of the works, but holds the property only for the purposes for which it was created. It has not, therefore, the same unlimited control over it which an individual has over his property.¹

Nor has the company a right to refuse permission for passengers to pass through the canal. On the contrary, any one has a right to navigate the canal for the transportation of passengers with passenger boats, without paying any toll on the passengers on board, upon his paying or offering to pay the toll prescribed by law upon the commodities on board, or the toll prescribed by law on a vessel or boat when it is empty of commodities.²

THIS cause came up from the Circuit Court of the United States for Delaware, on a certificate of division in opinion between the judges thereof.

It involved the construction of the ninth and eleventh sections of the charter granted by Maryland, the provisions of which are similar to those of the charter granted by Delaware.

"SEC. 9. For and in consideration of the expenses the said stockholders will be at, not only in cutting the said canal and other works for opening the said navigation, but in maintaining and keeping the same in repair, the said canal and works, with all their profits, under the limitations aforesaid, shall be, and the same are hereby, vested in the said corporation for ever, and it shall and may be lawful for the said president and directors, after the said canal shall be made navigable, to demand and receive the following tolls every pipe of wine or French brandy containing 'one dollar and twenty-five cents,' [&c., enumerating articles and specifying the tolls.] and for all other commodities the same proportion, agreeable to the articles herein enumerated; and every boat or vessel which has not commodities on board to pay the sum of four dollars shall pay so much as, with the commodities on board, will yield the sum aforesaid, and every empty boat or vessel four dollars, except an empty boat or vessel returning, whose load has already paid the tolls affixed, in which case she shall pass toll-free."

"SEC. 11. The said canal and works to be erected thereon by virtue of this act, when completed, shall for [*173 ever thereafter be esteemed and taken to be navigable as a public highway, free for the transportation of all goods, commodities, or produce whatsoever, on payment of the toll imposed by

¹ APPLIED. *The Geneva*, 16 Fed. New York &c. R. R., 13 R. I., 273; Rep., 876; *Flagstaff S. M. Co. v. Patrick*, 2 Utah T., 314. FOLLOWED. *Rice v. Railroad Co.*, 1 Black, 380. CITED. *Pearce v. Madison & Indianapolis R. R. Co.*, 21 How., 444; *Boston &c. R. R. v.* *Pennsylvania Lightning Rod Co. v. Board of Education*, 20 W. Va., 305. ² And see *Bonham v. C. C. & A. R. R. Co.*, 13 So. Car., 271.

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this act, and no tax whatsoever for the use of the water of the said canal, or the works thereon erected, shall at any time hereafter be imposed by all or either of the said States."

The following correspondence explains the origin of the dispute.

(*Exhibit No. 1.*)

To the President and Directors of the Chesapeake and Delaware Canal Co., Philadelphia.

Princeton, N. J., 24th March, 1847.

GENTLEMEN,—As I propose to establish a canal passenger line of boats between Camden, Philadelphia, and Baltimore, to pass through your canal, I think proper to give you notice of my intention so to do. My plan is to commence running on the 1st day of May next, to be continued through the spring and summer. I have been informed that the company of which you constitute the Board of President and Directors claim the right to prevent the transit of passengers through the said canal, if you deem it expedient so to do; and that if you permit it, you still maintain the right to charge a toll for each passenger whom you allow to pass through. Now, being of opinion that neither by your charter, nor by law, are you authorized either to exclude passengers, or to charge a toll on them, I beg to inquire whether any such right or authority is claimed or will be insisted on by you, so as to prevent future misunderstanding, and I shall be obliged by an answer at your earliest convenience.

Very respectfully, your obedient servant,

(Signed,)

J. A. PERRINE.

To CALEB NEWBOLD, ESQ.,

Pres't Ches. and Del. Canal Co., Philadelphia.

(*Exhibit No. 2.*)

{ *Chesapeake and Delaware Canal Office,*
Philadelphia, 30th March, 1847.

At a meeting of the Board of President and Directors of the Chesapeake and Delaware Canal Company, held this day, the President laid before the board a letter dated 24th instant, from John A. Perrine, Esq., of New Jersey, stating his intention to *establish a canal passenger line between Camden, Philadelphia, and Baltimore, and making inquiry *174] as to the transportation of passengers through the canal, and a charge of tolls therefor.

The said letter was read and considered, and it was resolved, That the President reply to Mr. Perrine, and inform him

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that the company claims the right to exclude passengers unless their transit is allowed by the special permission of the company, and, if that is granted, then to receive a fair rate of toll for each passenger.

Extracts from the minutes.

PETER V. LESLEY, *Sec.*

(*Exhibit No. 3.*)

To JOHN A. PERRINE, ESQ., Princeton, New Jersey.

{ *Chesapeake and Delaware Canal Office,*
Philadelphia, 30th March, 1847.

SIR:—Your letter of the 24th instant, addressed to the President and Directors of the Chesapeake and Delaware Canal Co., has been received, and was laid before the board. A resolution was passed by them, of which I enclose you a copy. The company regard the canal as a “public highway, free for the transportation of all goods, commodities, or produce whatsoever,” on payment of the tolls “authorized by charter, and for boats or vessels which have not commodities on board,” on payment of the sum authorized in such case by charter; but they deny that it is a public highway for the transportation of passengers, and claim the right to exclude passengers, except by special permission of the company; and if that is granted, then to receive a fair rate of toll for each passenger. The canal was intended by the charter to be used by vessels engaged in commerce, not by passenger lines, which interfere with the trade and injure the canal. Any vessel you may send in the line you propose to establish will be permitted to pass through, if they have goods, commodities, and produce on board; or, if empty, on payment of the regular tolls now imposed. If you carry passengers, or persons not engaged in the navigation or business of the vessel or cargo, you will be required to pay one dollar toll for each passenger, on arriving at the first lock. If you refuse to make this payment, or to land your passengers, the vessel will not be permitted to pass through the canal. I am directed also to say, that, if your vessels pass through the canal, they will be required to adhere strictly to all the existing rules and regulations as to speed and conduct. Very respectfully, your obedient servant,

(Signed,)-

C. NEWBOLD, JR., *President.*

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*(*Exhibit No. 4.*)

To the President and Directors of the Chesapeake
and Delaware Canal Company.

Princeton, New Jersey, April 1st, 1847.

GENTLEMEN :—I have received the letter of your President, dated the 30th of March. After due reflection, I have in reply to say, that I do not consider the Chesapeake and Delaware Canal Company as being authorized by law, either to exclude passengers from my vessels, or to charge me any other toll than the sum they are authorized by the charter to receive for an empty vessel. This I will pay, but no more, unless I have commodities on board, and then no more than the regular tolls now imposed thereon. Not deeming it necessary to prolong this correspondence, I shall only further repeat my notice, that I shall commence the canal passenger line mentioned in my letter of the 24th ultimo on the 1st day of May next, and I trust no obstacle will be presented by your officers or agents at the canal.

Very respectfully, your obedient servant,
(Signed,) JOHN A. PERRINE.

(*Exhibit No. 5.*)

{ *Philadelphia, Chesapeake, and Delaware
Canal Office, April 6th, 1847.*

At a meeting of the Board of Directors of the Chesapeake and Delaware Canal Company held this day, the President laid before the board a copy of a letter addressed by him on the 30th of March, 1847, to John A. Perrine, Esq., of Princeton, New Jersey, in compliance with the resolution of the board on the 30th of March, 1847, and also the answer of Mr. Perrine thereto, dated the 1st instant.

The said letters were read and considered, and that of the President approved. It was then, on motion, resolved,—

That the President instruct the superintendent at the Delaware Tide Lock, on the Chesapeake and Delaware Canal, to permit any vessel of the canal passenger line established by John A. Perrine, Esq., to pass through the canal, if it have goods, commodities, or produce on board, or if empty, on payment of the regular tolls now imposed; but if the said vessel carry passengers or persons not engaged in the navigation or business of the vessel, or cargo, to require from the master of said vessel the payment of one dollar toll for each passenger, before said vessel passes out of said lock; and if
*176] such payment be not made, or the passengers be not
landed from said vessel, *then not to permit it to pass

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through the canal. And further, to instruct the superintendent, and the officers and agents of the company, to be diligent in requiring any such vessel, if it shall enter or pass through the canal, to adhere strictly to all the existing rules and regulations as to speed and conduct.

Resolved, That the President transmit to Mr. Perrine a copy of the above resolution.

Extract from the minutes.

PETER V. LESLEY, *Secretary.*

(*Exhibit No. 6.*)

To JOHN A. PERRINE, ESQ., Princeton, New Jersey.

{ *Chesapeake and Delaware Canal Office,*
Philadelphia, April 6th, 1847.

SIR:—Your letter of the 1st inst. was received and laid before the board. Pursuant to their direction, I inclose a copy of a resolution adopted in relation thereto.

It is proper for me to apprise you, that the instructions therein mentioned have been given to the superintendent at the Delaware Tide Lock, and they will be strictly enforced.

Very respectfully, your obedient servant,
(Signed,) C. NEWBOLD, JR., *President.*

(*Exhibit No. 7.*)

To MR. JOHN ASH, Superintendent of the Delaware Tide Lock on the Chesapeake and Delaware Canal.

{ *Chesapeake and Delaware Canal Office,*
Philadelphia, April 6th, 1847.

SIR:—I inclose a copy of a resolution this day adopted by the Board of President and Directors, in relation to a canal passenger line established by John A. Perrine, Esq., of New Jersey; you will be particular in enforcing the decision of the board, as contained in this resolution.

Very respectfully yours,
(Signed,) C. NEWBOLD, JR., *President.*

In consequence of this action, the complainant, on the 12th of April, 1847, filed his bill in the Circuit Court for the Delaware District, setting forth the preceding facts; and to the end that he might be protected against the acts and doings of the said corporation, and that the right to transport passengers through the said canal, in his said canal passenger line, and in boats and vessels upon payment of the tolls author-

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*177] ized by law upon *the boats or vessels, or upon the goods, commodities, or produce on board thereof, and free from any charge in respect of the passengers transported in said canal passenger line, or on board of the said boats or vessels, might be established by the decree of the court, and the said corporation restrained from preventing the transit of passengers in his said canal passenger line, and from imposing any toll upon it in respect of the passengers on board of the same, or from hindering its free passage with passengers and persons, others than those engaged in the navigation or business of the vessel or cargo, until the said payment in respect of such passengers and persons on board; he prayed for an injunction to restrain the corporation and its superintendent at the Delaware Tide Lock, and its officers and agents, from executing and carrying into effect the resolution of the board, and the instructions issued in pursuance thereof.

The company, on the 3d of May, filed their answer, in which they admitted the facts and proceedings alleged in the complainant's bill, and that the instructions given to their officers would be enforced, in regard to the canal passenger line of the complainant, and any boat or vessel belonging to him: but they denied that either by any provision, terms, or conditions of their charters of incorporation, or by any law, they are or were forbidden, or ought not to have passed the resolution in question, or given such instructions, but, on the contrary, that they are advised that the same are within their franchises, authorities, rights, and privileges granted by or arising under their charters of incorporation, and the acts supplementary thereto, and that they ought not to be restrained from enforcing them, but allowed to do so.

At May term, 1847, the cause coming on to be heard, the following questions occurred:—

1st. Is the canal company entitled to charge the compensation or toll mentioned in the proceedings for passengers on board the complainant's boat passing through the canal?

2d. Has the complainant a right to navigate the canal for the transportation of passengers, with passenger boats, paying or offering to pay toll upon the boats as empty boats, or upon commodities on board, but without toll or compensation for passengers, as proposed in his correspondence contained in the exhibits?

And upon each of these questions the opinions of the judges were opposed.

And thereupon, at this same term, at the request and upon motion of the complainant's counsel, the said points, on which

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*the disagreement has happened, are stated under the direction of the judges, and to be certified, under [*178 the seal of this court, to the Supreme Court of the United States, at their next session, to be finally decided.

The case was argued by *Mr. Whiteley*, for the complainant, and by *Mr. Gilpin* and *Mr. Bayard*, for the defendants. It was brought up by the defendants, and therefore opened, by *Mr. Gilpin*, who was followed by *Mr. Whiteley*, and the argument was concluded by *Mr. Bayard*. Nevertheless, the complainant's points will be stated first.

Mr. Whiteley made the following points for the complainant:—

First point. There is no provision in the charter of the Chesapeake and Delaware Canal Company, authorizing the company to charge toll or compensation on the passengers in any boat or vessel passing through the canal. 3 Delaware Laws, 170. Collection of Laws relative to Ches. and Del. Canal Co., 9, 10, 25, 26, 27 (attached to bill of the complainant).

Second point. Corporations have only such powers as are specifically granted by the act of incorporation, or such as are necessary to carry into effect the powers expressly granted. 2 Kent's Com., 298; *Head and Amory v. Providence Ins. Co.*, 2 Cranch, 127; *Charles River Bridge v. Warren Bridge*, 11 Pet., 420.

Third point. The canal having been constructed pursuant to an act of incorporation, passed by the legislatures of Delaware and Maryland, the right of the company to toll is derived entirely from the charter, and is to be considered as if there was an agreement between them and the public, the terms of which are expressed in the act of incorporation; and the rule of construction is, that any ambiguity in the terms of the contract must operate against the corporation, and in favor of the public. The corporation, therefore, can claim nothing which is not clearly given to them by their charter. *The Proprietors of the Stourbridge Canal v. Wheeley et al.*, 2 Barn. & Ad., 792; *Kingston Dock Co. v. La Marche*, 8 Barn. & C., 42; *Charles River Bridge v. Warren Bridge*, 11 Pet., 544.

Fourth point. By the incorporation of this company, certain franchises were granted by the public to them, and those franchises were of importance to the public interest. Nothing therefore passes to the corporation by implication. *United States v. Arredondo*, 6 Pet., 738; *Beatty v. Lessee of*

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Knowler, 4 Pet., 168; *Providence Bank v. Billings and Pitman*, 4 Pet., 514; *Charles River Bridge v. Warren Bridge*, 11 Pet., *545, 546; *Leeds and Liverpool Canal v. Husler*, 2 Dowl. & Ry., 556; 1 Barn. & C., 424.

Fifth point. The canal is expressly made, by its charter, a "public highway." Collect. of Laws relative to Ches. and Del. Canal Co., 11, 27; *Doe d. Bywater v. Brandling et al.*, 7 Barn. & C., 643.

Sixth point. The use of the waters of the canal is public, though the canal itself is private property; the complainant, therefore, as one of the public, has the right to the use of its waters, subject only to the express restrictions contained in the charter,—the payment of such tolls as the charter authorizes upon the commodities on board of his boats, or the toll fixed by the charter upon empty boats.

Seventh point. That the charter of the said Chesapeake and Delaware Canal Company gives the said company no power to refuse a passage to any vessel through the said canal, except upon refusal or neglect of the captain or owner of any such vessel to pay the toll fixed by the charter. Coll. of Laws relative to Ches. and Del. Canal Co., 11, 26.

The points on behalf of the canal company were the following:—

First point. If conceded that, in cases of ambiguity in legislative grants or charters, the construction should be in favor of the public, yet no forced or extravagant construction in favor of the public can properly create an ambiguity; but a rational and fair exposition should be made, according to the general rules which govern in the exposition of all public statutes. *Dwarris on Stat.*, c. 11, p. 658; *Stevens v. Duckworth*, Hard., 344; *Rex v. Burchett*, 1 Show., 108; *Mitchell v. Soren*, Park., 233; *Sussex Peerage Case*, 11 Cl. & F., 143; *Rex v. Pease*, 1 Nev. & M., 694; *Rowe v. Shilson*, 4 Barn. & Ad., 731; 1 Nev. & M., 739; *Rex v. The Grand Junction Canal Co.*, 3 Railw. Cas., 14; *Rex v. The Glamorgan Canal Co.*, 3 Railw. Cas., 16; *The Provost of Eton College v. The Great Western Railway Co.*, 1 Railw. Cas., 220; *Barrett v. The Stockton and Darlington Railroad Co.*, 2 Man. & G., 134; *Hopkins v. Thoroughgood*, 2 Barn. & Ad., 921; *The Charles River Bridge Company v. The Warren Bridge Company*, 11 Pet., 589, 598.

Second point. By a fair and just interpretation of the charter of the Chesapeake and Delaware Canal Company, granted by the States of Delaware and Maryland, the public have no right to use the canal for the transportation of pas-

sengers, it *being a limited highway by the terms of the grant, and the right of the public to the use of the canal as a highway existing under and by force of the grant alone. The Maryland Charter, § 11; The Delaware Charter, § 10; Maryland Laws, 1827, ch. 207, 1831, ch. 296, § 19; Delaware Laws, 1829, p. 323, 1832, p. 114; *Stafford v. Coyney*, 7 Barn. & C., 257, 260; *The Seneca Road Company v. The Auburn and Rochester Railroad Company*, 5 Hill (N. Y.), 174.

Third point. The canal is the property of the defendants, subject to the use of the public to the extent prescribed in the charter, but the *jus publicum* is derived from the charter alone, and the right of property remains in the defendants, with all its attributes and incidents, not derogating from the public right; and among those incidents is the right to demand and receive compensation for the use of the property for other purposes than those to which the *jus publicum* applies. 2 Coke, Inst., 220; Hale de Jure Maris, 73, 77; *Heddy v. Wellhouse*, Moo., 474; *Crispe v. Bellwood*, 3 Levinz, 424; *Rex v. Burslett*, 1 Ld. Raym., 149; *Northampton v. Ward*, 2 Str., 1238; *Rex v. The Mersey and Irwell Nav. Co.*, 4 Man. & Ry., 98; *Rex v. The Avon Nav. Co.*, 4 Man. & Ry., 23, 31, 36; *Rickards v. Bennett*, 1 Barn. & C., 233, 234.

Mr. Chief Justice TANEY delivered the opinion of the court.

The Chesapeake and Delaware Canal connects the waters of the Chesapeake and Delaware Bays, and derives its corporate existence from charters granted by Maryland, Delaware, and Pennsylvania. It passes through the territory of the first two States only; but Pennsylvania was deeply interested in this improvement, and Maryland, it appears, was unwilling to authorize it unless the opening of the navigation of the Susquehannah River was connected with the construction of this canal. Delaware, also, supposed itself to have some demands on Pennsylvania, as appears by the charter it granted. And in order to accomplish the objects which the different States had in view, each of them passed an act incorporating this company, with certain conditions annexed to the respective charters, concerning other objects, thereby making its incorporation a compact between them. The nature of this compact, and the purposes it was intended to accomplish, will be readily understood, from the situation of the navigable waters which this canal was intended to unite, and from the peculiar provisions inserted in the respective charters.

Before this canal was made, the city of Baltimore almost

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monopolized the trade of the country bordering on the *Chesapeake Bay, and of the numerous tide-water *181] rivers which penetrate the adjacent country. For, in order to reach Philadelphia, it was necessary to pass by sea from the capes of the Chesapeake to those of the Delaware, and commerce could therefore be carried on only in vessels fit to navigate the ocean. Philadelphia naturally desired to share in the trade thus exclusively enjoyed by Baltimore, by opening a safe and easy inland communication from one bay to the other; and it was evident from the nature of the country, that this could be effected by a canal of about thirteen miles in length, near the head of the Chesapeake Bay.

On the other hand, the interests of Baltimore were adverse to this canal, as it would deprive it of the advantage it then possessed, and it moreover desired to bring to its own port the vast productions of the country watered by the Susquehannah, which flows into the Chesapeake Bay at its head. But this river was obstructed by rocks, and the trade was for the most part carried on over land with Philadelphia; and these obstructions could not be removed without the consent of Pennsylvania, as some of the most serious impediments to navigation were within the limits of that State, a little north of the Maryland line.

The respective States naturally felt it their duty to foster their respective cities, as far as justice and the interests of the community, generally, would permit. Pennsylvania, therefore, would not agree to remove the obstructions in the Susquehannah, unless the canal was authorized to be made; nor would Maryland authorize the canal, unless the trade of the Susquehannah was laid open to Baltimore. But neither State was disposed to sacrifice the interests of its citizens to the rivalry of the cities, and both were sensible of the advantages arising from the general extension of commercial intercourse, and were, it appears, willing that these two important avenues of trade should be opened at the same time.

The provisions of the charters of the different States show the particular interests which they respectively desired to protect, and the objects they proposed to attain by mutual coöperation.

The first act incorporating this company was passed by Maryland in 1799. The last section is in the following words:—

“Provided, that this law shall be of no force or effect until a law shall be passed by the State of Delaware authorizing the cutting the canal aforesaid, and until a law shall be passed

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by the Legislature of Pennsylvania declaring the River *Susquehannah to be a highway, and authorizing individuals or bodies corporate to remove obstructions [*182 therein, at a period not exceeding three years from the 1st day of March, 1800."

The charter from Delaware was obtained in 1801. In the clauses upon which the canal company relies, to maintain its claim in this controversy, the act of the Legislature of Delaware is in the same words with the act of Maryland, and, like Maryland, it annexed to its charter certain conditions, which it required Pennsylvania to fulfil before the act of incorporation should take effect. But it is unnecessary to state them particularly, as they have no reference to the canal or the river, and relate to subjects entirely distinct from the navigation which these improvements were intended to open.

In 1801, a few weeks after the act of Delaware was passed, Pennsylvania also incorporated this company, and in the same law declared the Susquehannah to be a public highway, and authorized the removal of the obstructions in it, as demanded by Maryland, and complied also with the conditions required by the charter from Delaware. The act of incorporation of Pennsylvania adopts the Maryland charter; and after having done so in general terms, it adds the following words:—"And shall derive no other powers under this act but such as are set forth in the said act of the Legislature of Maryland, or necessarily incident to a corporation."

As we have already said, the canal does not pass through any part of the territory of Pennsylvania, and consequently there was no necessity for a charter from that State to authorize a company to construct the work. All that was required of her was a compliance with the conditions annexed to the charters of the two other States. But as the city of Philadelphia was chiefly interested in this improvement, and the interests of Baltimore adverse, it was evident that subscriptions for the stock were to be looked for in the former, and not in the latter; and that it would be essential to the success of the enterprise, that its managers should be members of the community which favored it, and the board hold its sessions and transact its business amongst them. A charter from Pennsylvania was necessary to attain these objects, and thereby give assurance of the ultimate success of the work.

But a charter from Pennsylvania was necessary for another object still more important. The Susquehannah was to be a public highway, and this canal was intended to be equally free and open, subject only to the tolls to which the State

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had assented. And if this company should afterwards, under sanction of Maryland, be permitted to exercise powers beyond *those specified in the charter, or impose tolls and *183] burdens not therein enumerated, the navigation of the canal might be seriously obstructed, or so heavily burdened as to give to Baltimore, exclusively, not only the trade it then monopolized, but also that of the Susquehannah when the river should be opened. It was deemed, therefore, advisable by Pennsylvania, to combine with its assent to the Maryland condition an act incorporating the company, in order that it might derive its corporate existence from the three States, and its charter become a compact between them, which neither could alter without the consent of the other. Hence the insertion of the particular provision above mentioned in the Pennsylvania law, the object of which is not merely to assert a general and familiar principle in the construction of acts of incorporation, but to place it out of the power of the other States to enlarge the privileges of the corporation, or increase the burdens of the transit through the canal, without the consent of Pennsylvania.

The interest of that State certainly required that the canal, upon the payment of the stipulated tolls, should be free for all the purposes for which the Susquehannah was declared to be a public highway. The opening of the river and the construction of the canal were correlative improvements and portions of the same line of navigation, and there could be no reason of justice or policy for stopping at the canal the passengers who came down the Susquehannah on their way to Philadelphia. Whether they are made liable to toll, or not, must of course be determined by the language of the charters. But the interest and policy of Maryland and Pennsylvania undoubtedly required that their citizens should have a right to pass through. And if the corporation may refuse that permission to passengers, the line of communication, which was manifestly intended to be opened throughout to the same description of intercourse, may be inconveniently interrupted, and the policy of the States, and especially that of Pennsylvania, disappointed to a serious extent. The evil will not be lessened if the corporation is authorized to exact toll from passengers, and the amount left altogether to its own will and pleasure.

With this view of the general object and policy of these laws, we proceed, in the first place, to inquire whether the language used in them, according to its true and legal construction, gives to the corporation the right to demand toll

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from passengers who pass through the canal, or from vessels on account of the passengers on board.

This question may be disposed of in a few words. The articles upon which the company is authorized to take toll are *particularly enumerated, and the amount specified. The toll is imposed on commodities on board of a ves- [*184 sel passing through the canal.

No toll is given on the vessels themselves, except only when they have no commodities on board, or not sufficient to yield a toll of four dollars. Passengers are not mentioned in the enumeration, nor is any toll given upon a vessel on account of the persons or passengers it may have on board.

Now it is the well-settled doctrine of this court, that a corporation created by statute is a mere creature of the law, and can exercise no powers except those which the law confers upon it, or which are incident to its existence. *Head and Armory v. The Providence Ins. Co.*, 2 Cranch, 127; *Dartmouth College v. Woodward*, 4 Wheat., 636; *Bank of the United States v. Dandridge*, 12 Wheat., 64; *Charles River Bridge v. Warren Bridge*, 11 Pet., 544; *Bank of Augusta v. Earle*, 13 Pet., 587. And as no power is given to this corporation to demand toll from passengers, or from vessels on account of the passengers on board, it is very clear that no such power can be exercised, and no such toll lawfully taken.

The principle above stated is also an answer to the argument which places the right of the company to demand toll upon the ground that it is the absolute owner of the works and of the land it occupies, and insists that it may therefore, like any other owner, demand compensation from any person passing over its property. The error of this argument consists in regarding the title of the company to the property in question as derived to them upon common law principles, and measuring their rights by the rules of the common law. The corporation has no rights of property except those derived from the provisions of the charter, nor can it exercise any powers over the property it holds except those with which the charter has clothed it. It holds the property only for the purposes for which it was permitted to acquire it,—that is, to effectuate the objects for which the Legislature created it. And whether it may lawfully demand compensation from a person whom it permits to pass over its property must depend upon the language of the charter, and not upon the rules of the common law.

Certainly in this instance the power is not conferred in express terms, nor are any words used from which it can reasonably be implied. It would, indeed, be a most unusual

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one, and we believe without precedent in any charter heretofore granted by any State in this Union. For the power claimed is the right to demand toll from every citizen who *185] passes through the *canal, and to fix the amount at the discretion of the corporation. In form, it is true, the demand is made on the owner of the vessel engaged in transporting passengers; but it is immaterial to the passenger whether he is charged with the toll in the increased price of his passage, or by a direct tax upon himself. In either case the result is the same, and the power exercised is the same. Such an unlimited power to levy contributions on the public, and one so inconsistent with the ordinary course of legislation upon that subject, and, we may add, so unjust and injurious to the public, ought not to be sustained in a court of justice, unless it is conferred in plain and express words. It should not be inferred where the slightest doubt could arise, and the words are capable of any other construction; and still less can it be inferred in a charter like this, where the toll granted upon goods and property of every kind is so carefully specified and fixed in the law, and the charter altogether silent in relation to passengers. The contrary inference would seem to be irresistible.

We proceed to the examination of the second question certified. This point has been strongly pressed upon the court, and the argument on the part of the canal company has addressed itself chiefly to the case of passenger boats, without commodities or goods on board. But it is evident that the point must resolve itself into this,—Can they refuse permission to a boat laden with merchandise to pass through the canal, provided it has a passenger on board, and refuses to put him out. For so far as the right to pass through the canal is concerned, there is no distinction in the charters between passenger vessels and freight vessels, nor between vessels with a single passenger, and one with a multitude of passengers; nor between vessels with both cargo and passengers, and vessels with passengers only. The acts of incorporation make no distinction between either of these classes of boats, and we therefore can make none; and if the power claimed for the corporation exists as to one class, it must exist as to all.

The clauses mainly relied on by the counsel for the company are the ninth and eleventh sections of the Maryland charter, the language of these sections being adopted in the charters of the two other States. The ninth specifies the tolls which the company may demand, and after enumerating most of the principal and usual articles of inland commerce,

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and graduating the toll on some of them according to the quantity on board, and on others according to the weight, it concludes the enumeration in the following words:—

“And for all other commodities the same proportion, *agreeable to the articles herein enumerated, and every boat or vessel which has not commodities on board to pay the sum of four dollars shall pay so much as, with the commodities on board, will yield the sum aforesaid, and every empty boat or vessel four dollars, except an empty boat or vessel returning whose load has already paid the tolls affixed, in which case she shall repass toll free, provided such boat or vessel shall return within fourteen days after paying said tolls.”

Upon a fair construction of the language of this section, we think that this canal was intended to be a public highway, and that every boat or vessel suited to its navigation was to be at liberty to pass through, upon the payment of the tolls therein specified. And if nothing was on board upon which toll could be demanded, it still had a right to pass, upon payment of the toll imposed upon the vessel. And this construction becomes the more evident when this section is taken in connection with the one next following (the tenth), which authorizes the collector of the tolls to refuse passage to a vessel neglecting or refusing to pay “the toll” at the time of offering to pass. The words “the toll” in this section plainly and necessarily refer to the tolls enumerated in the preceding one. The refusal to pay them is the only case in which a power is given to stop the boat. And as no toll is given on passengers, or on the vessel on account of its passengers, it follows that a passage could not be refused to a vessel on account of its passengers, because there could be no refusal to pay the toll authorized by law; and the right to refuse the vessel being given in one specified case, and in none other, it is an implied restriction of the right to the particular case provided for.

But it is said that the right of the public to use the canal as a highway is restricted by the eleventh section, and confined to vessels engaged in the transportation of goods, commodities, and produce. The material words of that section are as follows:—

“That the said canal and the works to be erected thereon in virtue of this act, when completed, shall for ever thereafter be esteemed and taken to be navigable as a public highway, free for the transportation of all goods, commodities, or produce whatsoever, on payment of the toll imposed by this act.”

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It is insisted, on the part of the corporation, that the words "free for the transportation of all goods, commodities, and produce whatsoever," restrict the words which make it a highway, and limit the privileges of the public, to the transportation through it of goods, commodities, and produce.

But this construction can hardly be maintained, upon any *187] just rule for the interpretation of statutes. It would be inconsistent with the clause in the ninth section, hereinbefore set forth, which authorizes the passage of vessels which have no commodities on board. This construction would confine the right to those actually engaged in the transportation of goods. And if the canal was to be a highway for goods, commodities, and produce only, the privilege of the vessel would be derived altogether from the goods, and consequently a vessel without goods might be refused a passage, notwithstanding the express provision that she shall be entitled to go through. An interpretation of the statute which would lead to this result, and render different sections inconsistent with each other, cannot be the true one. The error consists in treating words, which were intended as a limitation of the powers of the corporation, as a restriction upon the rights of the public. In the opinion of the court, the words in question were intended to guard against the exaction of other or higher tolls than those given by the law, and not to restrict the right of passage. The clause in question declares that the canal shall be free for all goods, commodities, and produce whatever, upon payment of the toll *imposed by law*; meaning obviously, that no other or higher toll should be demanded. They were not intended to restrict the provision immediately preceding, that the canal should be a highway, but more effectually to secure the right of the public by restricting the toll to be demanded to the toll *imposed by the act*. They were introduced like the provision in the charter from Pennsylvania hereinbefore mentioned, which prohibits the company from exercising any powers but such as are set forth in the charter, or necessarily incident to a corporation. Neither of these provisions was necessary, but they were introduced as measures of precaution, to guard against strained and forced inferences, which the desire of gain might induce the corporation to make, injurious to the rights of the public, and contrary to the intention of the Legislature. The right claimed by this corporation, therefore, can find no justification in the language and provisions of the sections relied on in the argument. It can find as little support from the general and known usages of trade and travel, at the time it was incorporated.

It is true that, when these charters were granted, travelling by water was inconsiderable and unimportant compared with what it now is, and nobody anticipated the immense increase which the invention of steam navigation has produced. But it is equally true, that, in every country where traffic and trade have been carried on by water, it has been the custom of *vessels engaged in the transportation of merchandise to carry passengers, and to have vessels thus engaged fitted in many instances with better accommodations than others, in order to induce travellers to take passage in them, and thereby increase the profits of the navigation in which they were engaged. In Maryland, with its broad bay, its great number of navigable tide water rivers interrupting travel by land, its numerous villages and towns on their banks, and its commercial metropolis seated at the head of the bay, it cannot be doubted that this usage prevailed extensively, and that vessels engaged in the transportation of produce or merchandise, or returning empty from market, habitually carried passengers, from whom they received a compensation. And a large portion of the members of the Legislature who voted on this charter, and who represented the counties on the Eastern Shore of Maryland, must have been in the habit of coming to the seat of government by water, and as passengers on board of a vessel, engaged either in the transportation of merchandise, or merely in the transportation of passengers. The Legislature, therefore, in incorporating this company, certainly acted with a full knowledge of this usage, and the general custom of travelling by water. Can it, then, be supposed, that, in opening this new communication, they meant to authorize the company to interdict the passage of its citizens as passengers through the canal? that, without any imaginable motive, they should deprive the public of the cheapest and most convenient mode of passing from the Chesapeake Bay to the city of Philadelphia? and that, while they took so much pains to make the canal a highway for property from any part of the United States, they yet authorized the company to shut it against persons, although those persons were citizens of their own State? We see nothing in the law that can justify the court in imputing to the Legislature such an object. It would be so utterly inconsistent with the policy of the States, and such an unnecessary and uncalled for interference with the habits, usages, and convenience of their citizens, that such an intention ought not to be inferred from obscure or doubtful words. But we see nothing that can be regarded as doubtful or obscure, in relation to this subject; on the con-

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trary, it is clear that every vessel suited to the navigation of the canal is authorized to pass through, upon the payment of the toll *imposed by law*. There is none imposed by law on persons or passengers. And there is no distinction in the charters between vessels with or without passengers.

It is very possible, indeed, if the improvements in steam navigation could have been foreseen, and the great increase *189] of travel and intercourse it would produce, that the Legislatures of the States might in some form or other have allowed a toll with reference to passengers, as a compensation for the facilities afforded by the canal. But it is not the province of this court to enlarge the powers of a corporation beyond the limitations of the charter, because circumstances have changed. Our province is to expound the law as it stands, not to determine whether larger powers would not have been given if the Legislature had anticipated events which have since happened. Besides, the question we are now discussing is not whether the company is entitled to demand toll from passengers or not, but whether it may refuse them passage through the canal. We have already shown, in a previous part of this opinion, that, upon well-settled principles for the construction of charters, as established by the decisions of this court, and uniformly acted on, the company are not entitled to take toll from passengers. And not being authorized to receive toll, we are now inquiring whether it may deny them the right to pass through. The unexpected increase of travel would certainly be no reason for clothing it with this power. It would rather be a reason for withholding it. For whatever ground there might be in the present state of things to induce the Legislatures of the States to allow some toll on account of passengers, it can be no reason for denying them the liberty to pass; since the increased number of travellers would make the refusal more extensively felt than at the time the charters were granted.

The word "empty" in the ninth clause of the charter, herebefore set out, has been commented on and some stress laid upon it. It is said that the right of passage is given only to vessels with commodities on board, or empty vessels; and that, as a vessel full of passengers cannot be said to be empty, the right of passage is not given. Certainly a vessel full of passengers cannot be said to be empty of passengers. But the charter does not speak of a vessel empty of passengers, but empty of goods; that is, without cargo. Looking at the word as it stands in the law, and the provision with which it is associated, its true sense cannot be mistaken. The section declares that every vessel, not having commodities on board

sufficient to pay the toll of four dollars, shall pay so much as, with the commodities on board, will yield that sum, and every empty boat or vessel shall pay four dollars. The word "empty," as here used, evidently means without cargo. The law is speaking of cargo, and of cargo only, and not of persons or passengers. In its broadest sense, a vessel is not perfectly empty when she has a crew on board, or ballast, or the ordinary supplies for the crew. *But we cannot take out of a statute a single word susceptible of different meanings, and expound it without reference to the context, and without any regard to the subject-matter of which the legislature is speaking, or to the provisions and language with which it is associated. The rules for the construction of statutes in this respect are familiar and well established, and cannot at this day need argument or illustration. The meaning of the word, when it is susceptible of different interpretations, must be determined from the context, and the subject-matter of which the law-makers are speaking. If a different rule were adopted, the court would in most cases defeat the intention of the legislature, instead of performing its legitimate office of carrying it into execution. In the case before the court, the word "empty" must be separated from the context, and applied to a subject of which the Legislature is not speaking, and which does not appear to have been in its mind at the time; that is, to passengers instead of merchandise, in order to deduce an argument from it in support of the power claimed by the corporation.

Besides, the corporation does not place its defence, nor does it claim the right to refuse a passage to the vessel, upon that ground. The right it insists upon in its answer and resolutions is, the absolute and unqualified right to refuse a passage to a vessel with passengers, whether she has a cargo or not, and whether she has a single passenger or a multitude. And this, indeed, is the true and only question that can be in controversy. For there is no justification whatever to be found in the law for taking a distinction between a single passenger and many passengers, or between passengers in a vessel full of cargo, and a vessel entirely without cargo and engaged in the passenger trade. If a passage through may be refused in one of these cases, it may be in all. Nor does the company claim that there is any distinction between passenger vessels and vessels intended for the transportation of goods. For it admits, in its correspondence with the complainant, that his vessel, although described as a passenger vessel, would be entitled to pass, provided he first landed his passengers, or would pay the toll on them demanded by the

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company. The right it claims relates only to persons on board, and not to the character, or pursuits, or objects of the vessel.

Indeed, if the right claimed by the company turned upon the construction of the word "empty," and the meaning suggested in the argument could be maintained, the dispute would be of very little importance, in point of emolument, either to the corporation or the navigator. For almost every *191] vessel engaged in *the transportation of passengers would usually, upon this line of navigation, have on board some article liable to toll. And if she had any cargo, however small, she would not pass as an empty vessel, but as a vessel with commodities on board, and be liable as such to pay so much as would make up the amount to toll imposed by law. If the power of the company to prohibit, therefore, is confined to vessels entirely without cargo, it would be of no great importance to them. But there is so little foundation in reason, in policy, or in the language of the law, for making a distinction between a vessel with a single box or bale of goods, and one without any, that no one, we presume, will seriously contend for it. Certainly the company relies upon no such distinction. It claims the right against all passenger vessels, whether they have cargo on board or are empty of cargo.

Nor do we think that any force can be given to the argument, that the transportation of passengers might require so much of the water of the canal as to destroy its usefulness in the transportation of produce. The supply demanded for a vessel with cargo would not be enhanced by the passengers on board. Nor would she be entitled to increase her speed on that account, so as to injure the banks of the canal. Nor can the scarcity or abundance of water influence the construction of the charter. But a conclusive answer to this argument is, that no such objection appears in the record. There is no evidence upon the subject, and the company, in its answer to the complainant's application, suggests no difficulty in the supply of water, nor that there is hazard of interruption to the transportation of produce on the canal, or danger to its banks. Indeed, they give the complainant to understand, that they are entirely able to comply with his proposal, and say that they will pass his boat through if he will land his passengers or pay toll upon them. They refuse upon the ground that they are entitled to toll, and place their defence on no other.

There is nothing in the record to show when this right was first claimed by the company, nor whether it is a new one

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recently thought of, or one which the company claimed and exercised from the time the canal went into operation. Evidently, it was not the construction given to the charters, either by the Legislature or the corporation, while the work was in the course of construction. For while it was in progress, subscriptions to the stock were proposed by Maryland and Pennsylvania, by laws reciting the advantages which this canal would afford to the United States, in transporting inland its armies and munitions of war. These recitals show that persons as well as *property were to pass through, and that it was expected to be a convenience for the [*192 transportation of persons, as well as of property.

Upon the whole, therefore, whether we look to the obvious policy of the compact between the States, under which this work was constructed, as indicated by their respective charters, or to the general and established usages of inland navigation at the time the charters were granted, or to the language of the several acts which define the powers of the corporation, we see no ground for maintaining the right now claimed. And this decision would be the same if the rule of construction in relation to corporations was reversed, and every intendment was to be made in favor of the corporation and against the public. For if we gave to the charters the most liberal interpretation in favor of the company, yet there is nothing in them which even upon this principle could, in the judgment of this court, bear the construction insisted on by the canal company, nor confer the powers which it claims to exercise.

But the rule of construction in cases of this description, as recognized by this court in the case of the *Charles River Bridge v. The Warren Bridge*, is this,—that any ambiguity in the terms of the grant must operate against the corporation and in favor of the public, and the corporation can claim nothing that is not clearly given by the law. We do not mean to say that the charter is to receive a strained and unreasonable interpretation, contrary to the obvious intention of the grant. It must be fairly examined and considered, and reasonably and justly expounded. But if, upon such an examination, there is doubt or ambiguity in its terms, and the power claimed is not clearly given, it cannot be exercised. The rights of the public are never presumed to be surrendered to a corporation, unless the intention to surrender clearly appears in the law.

The questions before us are of high importance to the community, and they are emphatically questions between the rights of the public and the powers of the corporation. The

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privilege of making this canal, and of receiving tolls upon it, was granted by the States without any compensation to the public but the convenience it was expected to afford. The States, as well as the United States, have contributed to the expense of its construction. And the court is called upon to decide whether the States who chartered this company have authorized it to exact any amount of toll it may think proper from their own citizens, as well as others, for the privilege of passing over it; or may, if such be its interest or policy, refuse altogether the permission to pass.

193] ^{}In the opinion of the court, the charters do not confer either of these powers upon the corporation, and we shall certify accordingly to the Circuit Court.

Mr. Justice McLEAN, Mr. Justice NELSON, and Mr. Justice WOODBURY dissented.

Mr. Justice McLEAN.

This, like all other and similar corporations, has its rights and privileges defined in its charter, and also the duties imposed upon it. The eleventh section provides, "that the said canal and the works to be erected thereon in virtue of this act, when completed, shall for ever thereafter be esteemed and taken to be navigable as a public highway, free for the transportation of all goods, commodities, or produce whatsoever, on payment of the toll imposed by this act"; "and no toll or tax for the use of the water of the said canal, and the works thereon erected, shall at any time hereafter be imposed by all or either of the said States."

By the ninth section, a great number of articles are specified, for which the company is authorized to charge certain rates of toll, "and for every gross hundred weight of all other commodities or packages ten cents, and for all other commodities the same proportion, agreeable to the articles herein enumerated; and every boat or vessel, which has not commodities on board to pay the sum of four dollars, shall pay so much as, with the commodities on board, will yield that sum; and every empty boat or vessel four dollars, except an empty boat or vessel returning, whose load has already paid the tolls affixed, in which case she shall repass toll-free, provided such boat or vessel shall return within fourteen days after paying said tolls.

And the tenth section declares, "In case of refusal or neglect to pay the toll at the time of offering to pass a vessel through the canal, the collector shall have the right to refuse a passage."

The defendant claims the right to run a line of packet-boats for passengers, to connect with steamboats at the termini of the canal; and the following questions are stated for our decision.

First, is the canal company entitled to charge the compensation or toll mentioned in the proceedings, for passengers on board the complainant's boats passing through the canal?

Second, "Has the complainant a right to navigate the canal for the transportation of passengers, with passenger boats, paying or offering to pay toll upon the boats as empty boats, or upon commodities on board, but without toll or compensation for passengers?"

*I think the first question must be considered in the negative, that the company have not the right to tax [*194 passengers one dollar each, or any other sum, for passing in a boat on the canal. They have no special authority to tax passengers in the act of incorporation, and, consequently, they cannot exercise any powers as a corporation except those which are given in the act.

I answer the second question also in the negative, that the complainant in the Circuit Court has "no right to navigate the canal for the transportation of passengers, with passenger boats, paying toll as for empty boats." The charter does not require this of the company, and the public can make no exactions upon the company, as accommodation, which the law does not impose upon them as a duty. The rights of the public and of the company must be determined by a construction of the charter.

What rights are reserved in the charter to the public? The eleventh section, above cited, declares the canal shall "be taken to be navigable as a public highway, free for the transportation of all goods, commodities, or produce whatsoever, on payment of the tolls imposed." The right of the public then is, to use the canal for the purposes stated, "on paying the tolls imposed." Does the right extend beyond this? It does not, in my judgment, if the section be construed by any known rule of construction.

This was the contract made with the company by the public. And is it not as binding on the one party as the other? The right on both sides is founded in contract. The company agreed to construct the work, and keep it in repair, on the conditions stated. Can these conditions be changed at the will of either party? If the public can make exactions beyond the charter, there is an end to chartered rights.

The right of transportation on this canal is given to the public, on the payment of toll, and without the payment of

toll there is no such right. A boat returning empty, "whose load has already paid the tolls," is not charged. But an empty boat, under other circumstances, is charged four dollars. If it have commodities on board which pay less than four dollars, the boat shall be required to make up that sum. And here is the whole extent of the right of the company to exact toll, and of the right of the public to use the canal.

The conveyance of passengers was not provided for in the charter. The transportation of the commodities specified, and the passage of empty boats, were the only obligations, in this respect, imposed on the company. But a majority of my *195] brethren have implied a right in the defendant to transport passengers without the payment of toll. The baggage of the passengers, if they have any, may be charged as commodities, but the owners of the baggage are as nothing; they are nonentities while on board the packet passenger boats on this canal; in fact, within the meaning of the charter, the boats are empty. This would seem to me to be rather a strained construction. I cannot persuade myself that the law-makers, when they authorized a tax of four dollars on an empty boat, intended to include a boat full of passengers.

We know that passenger boats afford a better profit than freight boats; and every one knows, from the more rapid movement of the former, they do more injury to the embankments of a canal than freight boats.

But it is asked in the argument, if a freight boat can be refused a passage if it have one passenger on board. Every boat must have hands on board of it to take care of the cargo and navigate the boat. And it is presumed that a strict inquiry is rarely, if ever, made, as to a single passenger on board. But I submit that this is no test of the principle involved. The right asserted is to run a line of packets exclusively for the accommodation of passengers. This will impose a duty, and a most onerous one, on the company, which, I think, is not within their charter.

If a canal-boat must be construed and taxed as empty, which is not laden with the commodities specified, I know not how deeply it may affect our internal navigation. All these questions are of great importance, and should not be influenced by presumed notions of policy. They are matters of right, as they may affect corporations, arising under contract.

Should the transportation of passengers be desirable to the company, they could, no doubt, by application to the legislative power, obtain a modification of their charter, in this

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respect, that shall be just to them and advantageous to the public. But as the present charter imposes no obligation on the company to transport passengers on the canal, and does not authorize them to charge a toll for such a service, this court have no power to require from them such a duty. It is not our province to make contracts, but to construe them. But this maxim, universally admitted, could give no security to chartered rights, if, by judicial construction, they may be made to include a service not expressed nor fairly implied.

It is well settled, that, where the law does not authorize toll, it cannot be charged. This is admitted and sustained by a majority of the court; and this necessarily, I think, exonerates the *company, where there is no express provision in the charter, from doing that for which they can [*196 receive no compensation. It is an inference as unsound in logic as it is in law, that the transportation of passengers, though not required by the charter, must be permitted by this company, without charge, as they have no power to tax them. And this, it seems, is the only duty required from the company without compensation.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Delaware, and on the points or questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel. On consideration whereof, it is the opinion of this court,—1st. That the canal company is not entitled to charge the compensation or toll mentioned in the proceedings for passengers on board the complainant's boats passing through the canal; and 2d. That the complainant has a right to navigate the canal for the transportation of passengers with passenger boats, without paying any toll on the passengers on board, upon his paying or offering to pay the toll prescribed by law upon the commodities on board,—or the toll prescribed by law on a vessel or boat when it is empty of commodities. Whereupon it is now here ordered and decreed, that it be so certified to the said Circuit Court.

 Neves et al. v. Scott et al.

WILLIAM NEVES AND JAMES C. NEVES, APPELLANTS, v.
WILLIAM F. SCOTT AND RICHARD ROWELL.¹

The rule formerly, with regard to the enforcement of marriage articles which created executory trusts, was this; namely, that chancery would interfere only in favor of one of the parties to the instrument or the issue, or one claiming through them; and not in favor of remote heirs or strangers, though included within the scope of the provisions of the articles. They were regarded as volunteers.

But this rule has in modern times been much relaxed, and may now be stated thus: that if, from the circumstances under which the marriage articles were entered into by the parties, or as collected from the face of the instrument itself, it appears to have been intended that the collateral relatives, in a given event, should take the estate, and a proper limitation to that effect is contained in them, a court of equity will enforce the trust for their benefit.²

The following articles show an intention by the parties to include the collateral relatives:—

"Articles of agreement made and entered into this 17th day of February, in the year 1810, between John Neves and Catharine Jewell, widow and relict of the late *Thomas Jewell, (deceased,) all of the State and county *197] aforesaid, are as follows, viz:—

"Whereas a marriage is shortly to be had and solemnized between the said John Neves and the said Catharine Jewell, widow, as aforesaid, are as follows, to wit:—that all property, both real and personal, which is now, or may hereafter become, the right of the said John and Catharine, shall remain in common between them, the said husband and wife, during their natural lives, and should the said Catharine become the longest liver, the property to continue hers so long as she shall live, and at her death the estate to be divided between the heirs of her, said Catharine, and the heirs of the said John, share and share alike, agreeable to the distribution laws of this State made and provided. And, on the other hand, should the said John become the longest liver, the property to remain in the manner and form as above."

Moreover, these articles are an executed trust, not contemplating any future act, but intended as a final and complete settlement.³

Property acquired by either party after the marriage must follow the same direction which is given by the settlement to property held before the marriage, if there is a clause to that effect in the same.

THIS was an appeal from the Circuit Court of the United States for the District of Georgia. It was the case of a bill filed upon the equity side of that court by William Neves, a citizen of Alabama, and James C. Neves, a citizen of Mississippi, against Scott and Rowell, citizens of Georgia.

The facts were these.

In the year 1810, John Neves and Catharine Jewell, widow of Thomas Jewell, deceased, in contemplation of a marriage shortly to take place between them, executed the following articles of agreement.

¹ Further decision, 13 How., 268.

² CITED. *Walker v. Walker*, 9 Wall.,

³ LIMITED. *Triplett et al. v. Ro-*
maine's Adm., 33 Gratt. (Va.), 660.

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“ Georgia, Baldwin County.

“ Articles of agreement made and entered into this 17th day of February, in the year 1810, between John Neves and Catharine Jewell, widow and relict of the late Thomas Jewell, (deceased,) all of the State and county aforesaid, are as follows, viz.:—

“ Whereas a marriage is shortly to be had and solemnized between the said John Neves and the said Catharine Jewell, widow, as aforesaid, are as follows, to wit:—that all the property, both real and personal, which is now or may hereafter become the right of the said John and Catharine, shall remain in common between them, the said husband and wife, during their natural lives, and should the said Catharine become the longest liver, the property to continue hers so long as she shall live, and at her death the estate to be divided between the heirs of the said Catharine and the heirs of the said John, share and share alike, agreeable to the distribution laws of this State made and provided. And, on the other hand, should the said John become the longest liver, the property to remain in the manner and form as above.

“ In witness whereof, the said John and Catharine hath *hereunto set their hands and affixed their seals the [*198 day and year above written.

“ JOHN NEVES, [L. s.]

her

CATHARINE X JEWELL, [L. s.]

mark

“ Test: CORNELIUS MURPHY,
JESSE WARD.”

The marriage took place soon afterwards.

In October, 1828, John Neves made a will, and shortly thereafter died. By this will he directed commissioners to be appointed who should divide his whole estate, both real and personal, equally between his wife, Catharine Neves, and George W. Rowell, to whom he devised his half; and appointed Captain Richard Rowell and Myles Greene his executors.

In a codicil, the testator directed that certain real and personal property should be sold for the payment of his debts.

Greene declined to act as executor, but Richard Rowell took out letters testamentary, and was proceeding to sell the property named in the will, when Catharine filed a bill against him in the Superior Court of Baldwin County, and obtained an injunction upon him to stay further proceedings. She

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produced the agreement above mentioned, alleged that, under it, she was entitled to the whole of the real and personal estate during her natural life, and offered to give security for the payment of all his debts. The result of this suit was, that Rowell was allowed the expenses which he had incurred whilst acting as executor, and Catharine gave bond, with security, for the payment of the debts of the estate.

In 1835, Catharine intermarried with William F. Scott, and died in September, 1844.

In February, 1845, William Neves, and James C. Neves, the brother and nephew of John Neves, filed their bill in the Circuit Court. The bill stated the above facts; alleged that, after the marriage between Catharine and Scott, all the property remained in their joint possession until her death; that Scott was insolvent, and had used a large amount of the money and proceeds of the estate in payment of his debts; stated, as an estoppel, the former judgment of a court in Georgia sustaining Catharine's right upon the ground of the validity of the marriage settlement; charged waste, and prayed for a discovery, and decree that they, the complainants, might be put into possession of one half of all the property which was owned by John Neves and Catharine Neves. They also made Richard Rowell a defendant.

*199] In April, 1845, the defendants both demurred to the bill.

In April, 1846, the Circuit Court, then holden by John C. Nicoll, the District Judge, sustained the demurrer, from which decree the complainants appealed to this court.

It was argued by *Mr. Walker* and *Mr. Johnson* (Attorney-General), for the appellants, and a printed argument was filed by *Mr. Stephens*, for the appellees.

The counsel for the appellants divided the argument into two branches.

I. That the articles amounted to a marriage settlement; that they went into effect as such; and no further act or conveyance was stipulated, or intended to be executed by the parties. In support of this construction the authorities relied on were *Atherly*, 121-123, 151; 2 *Vern.*, 702-705; 3 *Ves.*, 387, 397; 12 *Ves.*, 218; 9 *Sim.*, 195; 3 *Myl. & K.*, 197; 7 *Pet.*, 393.

This is a complete settlement.

1st. Because (if the reasoning of our opponents be adopted) it will frustrate a specific provision of the instrument in favor

of the complainants, and thus defeat the intention of the parties.

2d. It is under seal, which is usual in deeds, but not in mere articles.

3d. It is attested by several witnesses.

4th. It is not mere minutes, or heads agreed upon by the parties for a future settlement, but a complete settlement of itself.

5th. It neither directs nor contemplates any future act or further instrument to complete the settlement, but purports to be itself a final settlement.

6th. The words used are such as operate of themselves to transfer the property. It is not what the settlements shall be, but what by the instrument they are. From and after the marriage, the property, by virtue of the instrument itself, is to "remain in common between them, the said husband and wife," during their natural lives. This went into effect at once, as a legal estate upon the marriage; so, also, on the death of the husband before the wife. "The property to continue hers so long as she shall live." This was a life estate, vesting in her by law on the death of the husband; so, also, the subsequent grant to the heirs. They are all estates vested in law by the instrument itself, and no future act or conveyance was ever made or contemplated.

If the case were doubtful, it may be interpreted by the acts and declarations of the parties. These acts and declarations show that the instrument was understood by [*200 all parties to be a complete settlement. *Barstow v. Kilvington*, 5 Ves., 592 and note to ed. of 1844, p. 602; *Pulteney v. Darlington*, 1 Bro. Ch., 223, 236, 239; *Randal v. Randal*, 2 P. Wms. 464, 467; 2 Sugden on Vendors (9th ed.), 170.

(It was then argued that the acts of the parties in the prior suit, mentioned in the statement of this case, confirmed the validity of the instrument as a marriage settlement.)

II. But admitting, for the sake of argument, that the instrument must be regarded as mere articles, they are valid, and operate in favor of the complainants in this case, for the following reasons:—

1st. Because, even if voluntary and executory, they are under seal, and not a *nudum pactum*; they would operate as a bond, or covenant, on which damages could be recovered at law; and therefore are founded on a consideration which entitles them to be enforced in equity.

2d. If not available as a sealed instrument, to entitle complainants to a decree for the land, they do authorize us to

ask for a decree for the personal property, including the slaves.

3d. Because near relatives, such as brothers and nephews, being the heirs of one of the parties, are not volunteers.

4th. Because the complainants claim as heirs through one in whose favor the contract was made, and are also specially provided for in the contract, and come within the influence of the marriage consideration, as the nearest relations and heirs of the husband, one of the parties to the contract.

5th. Because the marriage contract, besides the consideration of marriage, was founded on an additional valuable consideration, namely, the grant of the husband's property to the wife, in common with the husband, during their joint lives,—the whole to her as survivor during her life, and the joint property on her death to the heirs of both; which benefit the wife received in full, constituting a purchase by the husband of the interest in exchange of the wife's property for himself and his heirs.

Independent of the marriage, the wife has received, under the contract, a full and valuable consideration in an amount of property of the husband greater than her own; and it is admitted, even by the District Judge, in his adverse decision as filed, that the contract was founded "on the consideration of marriage and other considerations."

And a very slight consideration, in addition to the marriage, and even a meritorious consideration (not valuable), *201] will enable *volunteers to recover. Some of these cases of slight considerations occur in executory agreements; some in covenants not contained in a settlement; others in additional covenants contained in a settlement, but sustained as covenants by a decree of specific performance, and not as deeds or a settlement. Atherly, 145, and 8 Watts & S. (Pa.), 413; s. c., 1 Hare & Wallace, 67; 1 Lev., 150; Hardr., 398; 2 Younge & Coll. Ch., 451.

6th. If, as in this case, the articles have been executed, in part, at the instance of Mr. and Mrs. Scott, securing them, by decree against the legatee, an estate in the property which they could only have taken under the articles, it establishes the articles, and, in the language of Atherly, "If a bill for a specific performance is brought by the issue, the court will direct the articles to be executed *in toto*, and consequently the settlement will contain limitations in favor of the volunteers," &c. The rule is the same as to the wife, the very party to the contract. The author adds in a note, "It may be proper to state, that where the court executes articles at

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all, it always executes them *in toto*, and not partially." Atherly, 125.

Here, at the instance of the husband, Scott, and wife, the will, which would have carried the property to Rowell but for the articles, is set aside, and carried into execution in favor of Scott and wife. The court thus having established the articles, and executed them in part, they must be executed *in toto*. And if one court executes the articles in part, another court, carrying out the intention of the first, will, at the proper time, direct the execution *in toto*.

The verdict of the jury (which, under the laws of Georgia, became a judgment in the case of *Catharine Neves v. Richard Rowell*) was in these words:—

"Bill in Equity and for Injunction.

"We, the jury, find for the complainant a life estate in the property, agreeably to the provisions of the marriage contract, leaving all other persons to contest their rights at her death."

Here the marriage contract was executed in favor of the wife, and to the extent of the provision in the contract for her, namely, "a life estate in the property, agreeably to the provisions of the marriage contract." All other parties were left "to contest their rights at her death." But how contest them? Why, surely, "agreeably to the provisions of the marriage contract"; the court simply leaving open, necessarily, who then would be the heirs of Catharine Neves and John Neves. If this were not so, Catharine Neves must have taken more *than a life estate, at least as regards what was her own property before the marriage. Now, [*202 surely, nothing could be more inequitable and unjust than that the wife should take at her own instance a life estate in the whole property (including that of her husband), and excluding during her life all his heirs or legatees, and then, when the wife, after the death of her husband (Neves), having enjoyed and had decreed to her a life estate in her husband's property as well as her own, her heirs now claim both properties. But under the decree the wife took but "a life estate," even in what had been her own property before the marriage; the wife then being limited to a life estate, by the decree affirming the marriage contract, how can her husband, Scott, claim any portion of this property as her heir, when she had but a life estate, terminating with her life, and not an inheritance? The limitation, then, of a life estate to the

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wife under the decree is conclusive against any one claiming merely as her heir.

Again, Scott, the second husband, is a stranger to the marriage contract; he is a pure volunteer, and he can claim as heir nothing of the property of Neves, independent of the contract; and if he claim under it as heir, it must be in accordance with its provisions, jointly with the heirs of John Neves.

The estate granted to John Neves's heirs is not an ulterior limitation, but a fee simple absolute, after the expiration of a life estate.

If it be an actual settlement, no question exists but that it will prevail even in favor of volunteers. Atherly, 144.

As to the first and second points,—Fonblanque's Eq., p. 343, note A, book 1, chap. 5, sec. 1; *Turner v. Benoin*, Hardres, 200; *Clough v. Lambert*, 10 Sim., 174, 177-179; 1 Eq. Cas. Abr., 84; *Wiseman v. Roper*, 1 Reps. in Chan., 158; *Randal v. Randal*, 2 P. Wms., 464, 466, 467; *Beard v. Nutal*, 1 Vern., 427; *Boughton v. Boughton*, 1 Atk., 625; *Lechmere v. Earl of Carlisle*, 3 P. Wms., 211, 221; *Bunn v. Winthrop*, 1 Johns. (N. Y.) Ch., 329, 336; Atherly, 81.

As to the third and fourth points of brief,—*Lechmere v. Earl of Carlisle*, 3 P. Wms., 211; *Vernon v. Vernon*, 2 Id., 593, 599; s. c., 1 Bro. P. C., 267, 268; *Wiseman v. Roper*, 1 Reps. in Chan., 158; 1 Wils., 124, 305; *Chaplin v. Homer*, 1 P. Wms., 484; *Jenkyns v. Keymish*, Hardres, 395, 397; 1 Chan. Reps., 275; 1 Cas. in Chan., 103; 1 Lev., 150, 237; *Lancey v. Fairchild*, 2 Vern., 101; *Knight v. Atkyns*, Id., 20; *Warwick v. Gerrard*, Id., 8; *Bailey v. Wright*, 18 Ves., 49; *Watt v. Watt*, 3 Ves., 244; *Symons v. Rutter*, 2 Vern., 227; 1 Eq. Cas. Abr., 17; *Davenport v. Bishop*, 2 Younge & Coll. *203] *Ch.*, 451; *Bleeker v. Bingham*, 3 Paige (N. Y.), 246; *Allen v. Rumph*, 2 Hill (S. C.) Ch., 3; *Talbot v. Archer*, 3 Hen. & M. (Va.), 399, 410, 411; *Watts v. Bullas*, 1 P. Wms., 60; Atherly, n. 1, p. 127, n. 1, p. 397, 398, 401, n. 1; *Colman v. Sarel*, 3 Bro. C. C., 12; 2 Kent, Com. (3d ed.), 172; *Pulvertoft v. Pulvertoft*, 18 Ves., 84, 92; 2 Sugd. on Vend., 162-166.

As to fifth point of brief,—*Lingen v. Souray*, 1 Eq. Cas. Abr., 175; *Osgood v. Osgood*, 2 P. Wms., 245, 254; *Stephens v. Trueman*, 1 Ves. Sr., 73; Atherly, 145-148 (and cases there cited), n. 2, p. 125, n. 1, p. 147, 160-164, 172, 177, 178, 186, n. 1, 301, n. 1, 336, 347, n. 1, 358, n. 2; 2 Kent, Com. (3d ed.), 173, 174; 2 Sugd. on Vend. (9th ed.), 166-168; 1 Hare & Wall. Leud. Cas., 67; *Duffy v. Ins. Co.*, 8 Watts & S. (Pa.), 413, 432-435.

The argument on the part of the defendants also considered the two points separately, viz. :—

1. That this was not a marriage settlement.
2. That the complainants were mere volunteers.

1. To show that this was not a final settlement, but only an executory contract, the authority relied on was 2 Story, Eq. Jur. (3d ed.), § 383.

The court below, in its decisions upon the demurrers, used this language in reference to this paper:—"That the instrument under which the plaintiffs ask the interposition of the court constitutes an executory, and not an executed agreement, can scarcely admit of a doubt. It is in terms an executory, and not an executed agreement, and of the most informal character. It transfers no property, passes no estate, declares no trustees, and contains no word of direct and immediate conveyance, and nothing to indicate that it was a complete and actual settlement. It relates, not merely to property in possession, but to that which might be acquired in future, and the greater part of that which is the subject of the plaintiff's bill was subsequently acquired either by purchase or descent, and could not be the subject of an executed contract. The title of the plaintiff, therefore, rests entirely in covenant."

2. We will suppose the point to be settled, that this instrument is mere articles, and not a legal, executed settlement; and that brings us to the main proposition, namely, that equity will not interfere, in any manner, to aid a volunteer claiming under marriage articles. Atherly on Marriage Settlements (27 Law Lib.), marg. pages 125, 127-151; 1 Story, Eq. Jur. (3d ed.), § 433; 2 Story, Eq. Jur., §§ 793, a, [*204 973, 986, 987, and note; *Ellison v. Ellison*, 6 Ves., [*204 662; 2 Kent, Com. (3d ed.), 172, 173; *Colman v. Sarel*, 1 Ves., 50.

It is useless to multiply authorities to sustain a position, which, as a general principle, is undeniable. We are aware that a class of cases may be found, in which it is said that equity will enforce articles, at the instance of a person "who claims through one who was himself within the influence of the marriage consideration, though he himself should not be within it." But when these cases are examined, it will be found that the person claiming in the cases adverted to really claimed as the heir of the party within the range of the marriage articles, and representing him, and as taking the interest which the ancestor had himself derived by and through the deed or articles; and not to enforce any claim which had vested in the collateral heir as such. For example, where by

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the articles the fee is vested in the husband, his collateral heir might bring his bill to enforce this claim of the husband, which he, the collateral heir had inherited.

But the claim of plaintiffs is urged by them upon a very different view. They are not setting up these articles to enforce any claim of John Neves, the husband; but, on the contrary, they expressly declare that his claim was limited to a life interest, and could not endure beyond that. They deny his right to make a will thereof, which could affect their "vested rights" under the "settlement." They claim, therefore, in their own right, not as coming in, in the estate of the first taker, "but as taking originally, in the capacity of purchasers." They do not say, we are heirs of the husband, John Neves, and as such heirs representing the interest or estate secured to him by these articles, but we claim by and through the instrument, as representing ourselves, and as answering to the description of the persons who were to take one half upon the death of the survivor of John and Catharine Neves. And we say that, despite John Neves's will, even if it has been fairly made, we are entitled to this half, because the articles limited his interest to his life, and then we, and not he, had the right to the remainder.

Such is the language which complainants use, and if they have stated their own case correctly they are mere volunteers, not within the consideration of the marriage settlement, who are seeking for themselves, and in their own right, to enforce marriage articles,—an aid which, we respectfully say, has never been awarded. It has been correctly said by the court below, in commenting upon the cases cited there in behalf of *205] plaintiffs, that this view is sustained by the very authorities which were invoked to invalidate it. The court below has classified the various authorities adduced by the plaintiff's counsel under three heads, and, as it would be a vain task for us to attempt to make more lucid such classification, we will adopt it as a part of our argument.

1. The first class refer to the established principle in equity, that what ought to be done shall be considered as done,—a rule so powerful as to alter the nature of things, and make money land, and land money. "Thus, money articed to be laid out in land shall be taken as land, and descend to the heir." *Lechmere v. Lord Carlisle*, 3 P. Wms., 215; *Babington v. Greenwood*, 1 P. Wms., 532.

"If, therefore, it be agreed by marriage articles that money shall be laid out in lands, to be settled, for example, to the husband for life, remainder to the sons of the marriage in tail, remainder to the daughters, remainder to the heirs of the hus-

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band for ever, (which, under the operation of the rule in *Shelley's case*, gives the whole fee to the husband,) equity will, at the instance of the proper party, one who claims through the husband, and not as purchaser, in his own right, consider this money as land, and treat the investment as actually made in the lifetime of the husband, and regard him as seized in his lifetime of an estate in fee devolving by descent upon such person as claims through him as heir." The court below says, that to this class may be referred *Kettleby v. Atwood*, 2 Vern., 298, 471; *Lancey v. Fairchild*, Id., 101; *Knight v. Atkyns*, Id., 20; *Edwards v. Countess of Warwick*, 2 P. Wms., 171; 4 Bro. P. C., 494; 3 Atk., 447; *Lechmere v. Earl of Carlisle*, 3 P. Wms., 211; Cases Temp. Talbot, 80; *Atherly*, 126, 127, 398; 2 Powell on Contr., 104.

It must be very manifest, that the case at bar has no manner of applicability to the principle involved in these cases.

2. The second class of cases referred to by the court below apply, "where the settlement is made through the instrumentality of a party whose concurrence is necessary to the validity of the settlement, and who insists upon a provision in favor of a person; for instance, a younger child, a collateral relation of the husband, who would not come within the consideration of marriage. Such person is held not to be a mere volunteer, but as falling within the range of the consideration of the agreement." Such are the cases of *Osgood v. Strode*, 2 P. Wms., 245; *Goring v. Nash*, 3 Atk., 186; to which may be added *Roe v. d. Hamerton v. Whitton*, 2 Wils., 356. But these very cases themselves establish (as is remarked by the court below) *that the marriage consideration alone will not support the limitation to a brother or sister, and are [206 therefore adverse to the claim of the present plaintiffs, inasmuch as there is no pretence to say, that they come within the range of the exception carved out in the decisions last referred to.

3. The third class of cases referred to by the court below, in sustaining the demurrers, are based upon the ground upon which Lord King principally rested his decree in the case of *Vernon v. Vernon*, 2 P. Wms., 594; (see also 3 Atk., 190; *Stephens v. Trueman*, 1 Ves., 74; *Williams v. Codrington*, Id., 513, *arguendo*;) namely, that an action might have been brought in the name of the trustees, for the recovery of damages for the non-performance of the covenant, and therefore, to avoid the circuitry of bringing such an action, and afterwards of applying to equity to have the damages invested in land, and settled according to the terms of the articles, and also because a court of law has no means of apportioning the

damages, according to the respective rights of the parties, equity would enforce the specific execution of the covenant. "But such a ground," says the court below, "is treated as forming an exception to the general rule, (1 Ves., 74,) and leaves this, and other cases where the same ground does not exist, subject to the operation of the general rule."

Indeed, as Mr. Atherly observes (p. 140, Law Library edition), "it does not very clearly appear on what ground Lord King founded his decree"; but unless it be founded on the above suggestion as to the right of the trustees to recover damages, or as a kind of satisfaction or recompense to the brothers for the disappointment they might experience from the rules of law giving the settler an absolute interest in a sum of money which had been bequeathed to the settler by another brother, and which was bequeathed over to the brothers claiming under the articles, if he, the settler, died without issue, it cannot be considered as sufficient authority to break down the well-established general rule.

The decision of Lord King was, it is true, affirmed by the House of Lords (4 Bro. P. C., 26,) but, as Mr. Atherly says, (p. 141,) there seems reason to suppose that they might be materially influenced by a circumstance, which Lord King does not appear to have adverted to, or even to have been acquainted with; namely, "that the settler's father (who was a party to the articles) insisted that the lands agreed to be purchased should be limited in remainder to his two younger sons (the plaintiffs), and afterwards declared that it should never have been a match if the intended wife and her friends, as well as the settler, had not agreed to it."

*207] *Lord King's decree acquires no additional weight, therefore, by the affirmance of the Lords, if they were influenced by this new feature, as is extremely probable; but the case resolves it into the principle recognized in the second class of cases, and is no authority to sustain the argument of the plaintiff's counsel.

The general rule remains, therefore, unassailed,—the exceptions do but prove it,—and the very cases which establish these exceptions affirm, in express language, or by necessary implication, the general principle, that a mere volunteer can have no assistance from a court of equity, at his instance, to enforce an executory contract. As our case cannot be brought within the range of any of these exceptions, we have the full protection of this well-established rule.

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the

United States held in and for the District of the State of Georgia.

The bill was filed by the complainants in the court below, to obtain the possession of the undivided half of an estate, embraced in a marriage settlement between John Neves and Catharine Jewell, entered into in contemplation of marriage, and which shortly afterwards took place.

Each of the parties, being the owner and in possession of considerable estates at the time, entered into the following agreement:—

“Articles of agreement made and entered into this 17th of February, 1810, between John Neves and Catharine Jewell, widow, and relict of the late Thomas Jewell, (deceased,) all of the State and county aforesaid as follows:

“Whereas a marriage is shortly to be had and solemnized between the said John Neves and the said Catharine Jewell, as aforesaid, are, as follows, to wit:—that all the property, both real and personal, which is now, or may hereafter become, the right of the said John and Catharine, shall remain in common between them, the said husband and wife, during their natural lives; and should the said Catharine become the longest liver, the property to continue hers so long as she shall live; and at her death the estate to be divided between the heirs of her, said Catharine, and the heirs of the said John, share and share alike, agreeable to the distribution laws of this State made and provided. And, on the other hand, should the said John become the longest liver, the property to remain in the manner and form as above.”

*The parties after the marriage held and enjoyed [*208 their respective estates in common, during their joint lives, and until the death of John in 1828; and after his death the same remained in the possession and enjoyment of Catharine, the survivor, until her decease in 1844; since which time, it has been in the possession and under the control of William F. Scott, her second husband, and one of the defendants. The other defendant is the executor under the will of John Neves, the husband.

The complainants are the brother and nephew, and only surviving heirs, of John Neves; and claim a moiety of the estate, according to the terms of the marriage settlement. And the questions presented in the case are upon the effect to be given to this instrument.

The argument, on the part of the defendants, is, that the deed is to be regarded in the light of marriage articles, creating executory trusts to be carried into execution at some

future day by an instrument that would operate to vest the estates according to the stipulations in the articles. And that, as the agreement is founded upon the consideration of marriage, and other considerations moving only between the parties, the complainants, being the collateral relatives of John Neves, do not, according to the rules of equity applicable to this species of contract, come within the reach and influence of the considerations, so as to entitle them to the interposition of a court of chancery to enforce the execution of the trusts. That where the trust is executory, and rests merely in covenant, the court will interpose only in favor of one of the parties to the instrument or the issue, or one claiming through them; and not in favor of remote heirs or strangers, though included within the scope of the provisions of the articles. (Fonbl., book 6, ch. 6, § 8; Atherly on Settlements, ch. 5, p. 125; 2 Story, Eq., §§ 986, 987; 2 Kent, Com., 173.)

Upon this ground, the court below sustained the demurrer to the bill, and denied the prayer of the complainants.

The numerous cases to be found in the books, several of which were referred to in the argument on this subject, are by no means uniform or consistent, and the general rule as stated, and upon which the case below turned, has been made the subject of so many exceptions and qualifications, that it can scarcely, at this day, be regarded as authority. (*Vernon v. Vernon*, 2 P. Wms., 594; *Edwards v. Countess of Warwick*, Id., 171; *Osgood v. Strode*, Id., 245; *Ithell v. Beane*, 1 Ves. Sr., 215; s. c., 1 Dick., 132; *Stephens v. Trueman*, 1 Ves., 73, 74; *Pulvertoft v. Pulvertoft*, 18 Ves., 90; 2 Kent, Com., 172, 173; Atherly, 145-148.)

*209] *The case of *Vernon v. Vernon* is a direct authority in support of the limitation in question; and the other cases to which I have referred are distinguishable only upon very technical and refined reasoning, hardly reconcilable with a common-sense administration of justice. The principle is, that, in order to bring collateral relatives within the reach and influence of the consideration, there must be something over and above that flowing from the immediate parties to the marriage articles, from which it can be inferred that relatives beyond the issue were intended to be provided for; and that, if the provision in their behalf had not been agreed to, the superadded consideration would not have been given.

That, for any thing short of this, they will be regarded as volunteers, in whose favor a court of equity will not interpose against the settler, or any one claiming under him.

But while the rule seems generally to have been adhered to

in the form in which it is stated, it has been practically disregarded; as the slightest degree of valuable consideration imaginable is seized hold of to give effect to the limitation.

And it need not be made to appear that these slight considerations were intended to support the provision for the distant relatives, it being assumed by the court as a presumption of law.

The Lord Chancellor in *Stephens v. Trueman* observed, "The old rule was, and is now, (although of late not so strictly adhered to,) that none can come here for a specific performance, who do not come under the consideration of the agreement; as that it shall not be for the benefit of collateral branches in marriage articles; but, as agreements are entire, and the several branches may have been in view, the court has in later cases laid hold of any circumstances to distinguish them out of it, still preserving the general rule."

And in *Edwards v. The Countess of Warwick*, the doctrine is stated still more strongly, where the Chancellor observed, "that the consideration for the precedent limitations on a marriage settlement has been applied even to the subsequent ones; as where, on a consideration of marriage, and portion, land has been settled on the husband for life, and then to the wife for life, remainder to the children, with remainder to a brother, these considerations have extended to the brother; and the reason is, because it may be very well intended, that the husband, or his parents, would not have come into the settlement, unless all the parties thereto had agreed to the limitation to the brother."

The result of all the cases, I think, will show, that if, from *the circumstances under which the marriage articles [*210 were entered into by the parties, or as collected from the face of the instrument itself, it appears to have been intended that the collateral relatives, in a given event, should take the estate, and a proper limitation to that effect is contained in them, a court of equity will enforce the trust for their benefit.

They will not be regarded as volunteers outside of the deed, but as coming fairly within the influence of the considerations upon which it is founded; the consideration will extend through all the limitations for the benefit of the remotest persons provided for consistent with law.

The provisions in the deed before us are very peculiar, and different from any that have come under my observation in an examination of the cases; and, of themselves, would, probably, be sufficient to distinguish it from all of them in which the general rule has been applied.

The collateral relatives of the parties to the instrument seem, not only to have been within their contemplation at the time, but to have been the direct and special objects of their bounty.

None of the limitations are in favor of the issue of the marriage, *eo nomine*, usually found in these instruments; but are in favor of the several heirs of each of the parties, as a class, the estate to be divided equally between the two. The settlement seems to negative the expectation of issue, and seeks at once to provide for the collateral relatives; as the peculiar phraseology would hardly have occurred to the most inexperienced draughtsman, if he had had in his mind at the time the issue of the marriage.

It is true, the children or grandchildren coming within the description of the limitation to the heirs of each of the parties, being the heirs of both, would, if they survived the parents, take the estate to the exclusion of the collateral branches; but this would seem to be an accident, rather than a result to be derived from the frame of the limitation, as that looks directly to a provision for the separate and several heirs of each of the parties, and to an equal division of the estate between them.

Each of the parties appears to have been in the possession of considerable estates (which was the largest is not stated); and, on the event of the marriage, both were to become common property during their joint lives, and the life of the survivor; and, instead of providing for the return of the separate estate of each, on the termination of the lives, into the channel from which it was diverted by the marriage contract, they agree that the joint estate shall be divided equally, and that each moiety shall take that direction and be distributed in their respective families.

*211] To refuse to carry into execution this arrangement, therefore, would be, in effect, to overthrow the settlement; and defeat, not only the manifest intent, but the leading design, of the parties entering into it. None of the cases relied on, I think, go this length.

But, without pursuing this branch of the case farther, or placing our decision upon it, there is another ground, unembarrassed by conflicting authorities or refined distinctions, which the court are of opinion is decisive of the questions involved in favor of the complainants. And that is, that the deed in question is a marriage settlement, complete in itself,—an executed trust, which requires only to be obeyed, and fulfilled by those standing in the relation of trustees, for the

benefit of the *cestui que trusts*, according to the provisions of the settlement.

The defendants are not called upon to make a settlement of the estate, under the direction of the court, from imperfect and incomplete marriage articles, and which might or might not be subject to the objections stated.

The settlement has been made by the parties themselves: and the only question is, whether the defendants shall be compelled to carry it into execution.

The distinction between trusts executed and executory is this:—a trust executed is where the party has given complete directions for settling his estate, with perfect limitations; an executory trust, where the directions are incomplete, and are rather minutes, or instructions for the settlement. (1 Madd. Ch., 558; 2 Story, Eq., § 983.)

The former, as observed by Lord Eldon, in one sense of the word, is a trust executory; that is, he observes, if A. B. is a trustee for C. D., or for C. D. and others, that, in this sense, is executory, that C. D., or C. D. and the other persons, may call upon A. B. to make a conveyance, and execute the trust: but these are cases where the testator has clearly decided what the trust is to be; and as equity follows the law where the testator has left nothing to be done, but has himself expressed it, there the effect must be the same whether the estate is equitable or legal. (*Jervoise v. The Duke of Northumberland*, 1 Jac. & W., 550.) The remarks were made for a different purpose than the one in view here; but they afford a clear illustration of the distinction stated.

Now, the only plausible ground for contending that this instrument imports but mere articles, as contradistinguished from a marriage settlement, is, that in the caption it begins, "Articles of agreement," &c.; but it is to be observed, that the deed *is drawn up somewhat unskilfully, and [*212 without much regard to form; and that the draughts- man had not probably in his mind, if even he was aware of, the technical or legal distinction between the two instruments; and besides, and what is more material to the purpose, we must look to the body of the instrument, its provisions and tenor, and to the intent of the parties, as collected from the whole, in order to determine its character and effect.

Courts will endeavour, as much as possible, to give effect to marriage agreements according to the understanding of the parties; and where they evidently considered the instrument in the light of a final and complete settlement, not contemplating any future act, it will be so regarded; and in

order to effectuate their intent, one part of the instrument even will be taken as a complete settlement of the estate comprised in it, and another part as mere articles.

In the case before us, every portion of the estate is definitely settled, both in respect to the amount of the interest, and the particular persons who are to take; the limitations leave no part undisposed of; estates for life, and in remainder in the property, are limited with all the formality required to enable a court of equity to carry the trust into execution, according to the intent of the settlers. There is nothing in the instrument contemplating any further act to be done by them.

The practical construction, also, accords with that derived from their language. The estate was possessed and enjoyed under it, by both or one of them, from 1810 to 1844, a period of thirty-four years.

If a third person had been interposed, as trustee of the estates, with the limitation as found in the instrument, no one could, for a moment, have doubted but that the settlement would have been final and complete; and yet it has long been settled, that equal effect will be given to it in equity, when made only between the parties themselves; each one will be regarded, so far as may be necessary to effectuate their intent, as holding their several estates as trustees for the uses of the settlement. (2 Story, Eq., § 1380; Fonbl., book 1, ch. 2, § 6, *n. n.*; 2 Kent, Com., 162, 163; 9 Ves., 375, 383; 3 Johns. (N. Y.) Ch., 540.) There can be no objection to the execution of the trust on this ground.

It appears from the bill, that portions of the estate in the possession of the defendants were acquired by the parties to the settlement, subsequent to its execution, and it is supposed that this consideration is material in determining its character; and that if it should be regarded as a settlement, *213] and not mere *articles, these subsequent acquisitions would not be bound by it. But this is a mistake.

The instrument provides for subsequently acquired property by either of the parties, as well as the present and in such cases there is no doubt but that it follows the limitations of the settlement, the same as the property then in possession. (10 Ves., 574, 579; 9 Id., 96, 96; 7 Id., 294; 6 Id., 403, *n.*, Boston ed.)

Looking, then, at the instrument as complete in its directions and limitations in the settlement of the estate, and as presenting the case of an executed trust, the difficulty set up against the complainants when claiming under marriage articles disappears; for, being the beneficial owners, and

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vested with the equitable title, a court of equity will interpose, and compel the trustee, or any one standing in that relation to the estate, to vest them with the legal title.

We are of opinion, therefore, that the court below erred in giving judgment in favor of the defendants on the demurrer to the bill, and that the decree should be reversed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Georgia, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs, and that this cause be, and the same is hereby, remanded to the said Circuit Court, for further proceedings to be had therein, in conformity to the opinion of this court.

ROBERT M. WITHERS, PLAINTIFF IN ERROR, v. WILLIAM B. GREENE, ADMINISTRATOR OF RICHARD MAY, DECEASED.

The laws of Alabama place sealed instruments, commonly called single bills, upon the footing of promissory notes, by allowing the defendant to impeach or go into their consideration; and also permit their assignment, so that the assignee can sue in his own name. But in such suit, the defendant shall be allowed the benefit of all payments, discounts, and set-offs, made, had, or possessed against the same, previous to notice of the assignment.

The construction of this latter clause is, that where an assignee sues, the defendant is not limited to showing payments or set-offs made before notice of the assignment, but may also prove a total or partial failure of the consideration for which the writing was executed.¹

*Proof of a partial failure of the consideration may be given in evidence [¶214 in mitigation of damages.²

The English and American cases upon this point examined, showing a relax-

¹ All contracts for payment of money in the hands of the assignee, except instruments governed by the commercial law, are subject to all payments, discounts, and set-offs made or had prior to notice of assignment, and to any defences against the assignor or indorser, which could have been made. *Cook v. Citizens Mut. Ins. Co.*, 63 Ala., 37.

It is the duty of an assignee of a

non-negotiable *chase in action*, in order to protect himself against a payment by the debtor to the original creditor, to notify the former of the assignment; the burden of proving notice prior to payment, in an action upon the demand, where such a payment is established, is upon the plaintiff. *Keermens v. Ellsworth*, 64 N. Y., 159.

² FOLLOWED. *Winder v. Caldwell*, 14 How., 444.

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ation of the old rule, and allowing a defendant to obtain justice in this way, instead of driving him to a cross action for damages.³

Thus, where the obligor of a single bill was sued by an assignee, and pleaded that the bill was given for the purchase of horses which were not as sound nor of as high a pedigree as had been represented by the seller, such a plea was admissible.⁴

It is not a sufficient objection to the plea, that it omits a disclaimer of the contract, and a proffer to return the property. If the defendant looked only to a mitigation of damages, he was not bound to do either, and therefore was not bound to make such an averment in his plea.

Nor is it a sufficient objection to the plea, that it avers that the obligation was obtained from him by fraudulent representations, or that it concludes with a general prayer for judgment. Pleas in bar are not to receive a narrow and merely technical construction, but are to be construed according to their entire subject-matter.

In this respect there is a difference between pleas in bar and pleas in abatement.

THIS cause was brought up, by writ of error, from the Circuit Court of the United States for the Southern District of Alabama.

It was an action of debt brought in the District Court of the United States for the Middle District of Alabama, by May, assignee, on a single bill, under seal, for the payment of three thousand dollars, executed by R. W. Withers to A. B. Newsom, a citizen of Tennessee, and by him assigned to the plaintiff. Pending the suit May died, and Greene qualified and revived in his name as administrator.

After some pleas which were withdrawn, the defendant filed the following:—

“And for a further plea in this behalf, said defendant, by leave, &c., says, *onerari non*, because he says that heretofore,

³ FOLLOWED. *Van Buren v. Digges*, 11 How., 481, 476. CITED. *Lyon v. Bertram*, 20 Id., 164.

Whenever compensation or an equivalent is claimed by a party in return for the performance of conditions for which such compensation or equivalent has been stipulated, the person so claiming is bound to show a fulfilment in good faith of those conditions; and the party against whom the claim shall be made shall be permitted to repel it by proof of an entire failure to perform or of an imperfect or unfaithful performance; or by proof of injurious consequences resulting from either of the delinquencies; and shall not be driven exclusively to his cross action. *Van Buren v. Digges*, *supra*.

Although it is true, as a general rule, that unliquidated damages cannot be the subject of set-off, yet it is

well settled that a total or partial failure of consideration, acts of non-feasance or misfeasance, immediately connected with the cause of action, or any equitable defence arising out of the same transaction, may be given in evidence in mitigation of damages, or recouped; not strictly by way of defalcation or set-off, but for the purpose of defeating the plaintiff's action in whole or in part, and to avoid circuity of action. *Winder v. Caldwell*, *supra*.

⁴ CITED. *City of Memphis v. Brown*, 1 Flipp., 228; *Buchtel v. Mason Lumber Co.*, Id., 650.

The defendant may give in evidence, in mitigation of damages in assumpsit for goods sold and delivered, that the goods were inferior in quality to what they were represented to be at the sale. *Miller v. Smith*, 1 Mason, 437.

to wit, on the day of , in the year 1839, said defendant, at the instance and request of one A. B. Newsom, the payee of the sealed note or writing obligatory in the plaintiff's declaration mentioned, purchased of the said Newsom two certain fillies, that is to say, one dark brown filly, said to have been foaled in the spring of the year 1835, and one sorrel filly, said to have been foaled the 22d day of June, in the year 1837, at and for a large sum of money, to wit, the sum of four thousand dollars, to be paid by the said defendant to the said Newsom; for the payment of which said sum, in part, defendant gave to the said Newsom the said sealed note or writing obligatory, in the said plaintiff's declaration described, and said defendant avers that said sealed note was given for and upon no other consideration whatsoever. And said defendant further avers, that the said Newsom falsely and fraudulently represented to said defendant, that the said fillies were raised by himself, and that the said fillies were sound, and that the said fillies had *certain pedigrees, [*215 that is to say,—(the pedigrees are set forth in the plea, but they are here omitted,)—all which said representations as to the soundness of the said fillies, as to the fact that they were raised by the said Newsom, and as to their pedigrees, were false and untrue, and known to be false and untrue by the said Newsom, and were so made, as aforesaid, by the said Newsom to deceive and defraud the said defendant.

“And said defendant further says, that he, relying upon the said false and fraudulent representations of the said Newsom, and believing the same to be true, made the said purchase of the said fillies. And said defendant further says, that said fillies were purchased by him as aforesaid for their blood, and for the turf, and that otherwise they were wholly worthless to the said defendant. And said defendant further says, that the said Newsom was before, and at, and hath been ever since, and still is, a citizen of the State of Tennessee, residing three hundred miles or more from the residence of said defendant, who then resided, and still resides, in the County of Greene, in this State; and that said Newsom brought the said fillies from Tennessee to the residence of said defendant, in Greene County, and then sold them to said defendant as aforesaid.

“And said defendant further saith, that he did not discover the extent of the unsoundness of the said fillies until a long time after said purchase, to wit, the fall after the said purchase, when they were being trained for the turf, and that he did not learn that the pedigrees were false until a long

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to answer where he has made fraudulent representations concerning them, which amounts to a warranty in law. *Seixas v. Wood*, 2 Cai. (N. Y.), 48. In the English cases, where the right to defend or to recover back money paid under contracts has been denied, it is conceded that the vendee may sue on the warranty or for the deceit. The leading case of *Hunt v. Silk*, 5 East, 449.

In Alabama the rule has been established, under their statute, that, where "fraud enters into the transaction, it is competent for the defendant, on proof of it, to show a defect in the consideration in diminution of damages." And that, "wherever a defendant can maintain a cross action for damages, on account of a defect in personal property purchased by him, or for a non-compliance by the plaintiff with his part of the contract, the former may, in defence to an action upon his note, made in consequence of such purchase or contract, claim a deduction corresponding with the injury sustained." *Peden v. Moore*, 1 Stew. & P. (Ala.), 71; 3 Stew. (Ala.), 98.

In the case of *Peden v. Moore*, the court below refused to instruct the jury, that, if they believed that the consideration of the note had failed to the full amount, except what had been paid, they should give a verdict for the defendant; and *218] ruled *that, unless a total failure of consideration was proved, they should find for the plaintiff. The decision was reversed, and the rule established, that a partial failure of consideration was admissible in defence. See, also, *Barrett v. Stanton and Pollard*, 2 Ala., 181. The case of *Peden and Moore*, it is submitted, must rule this.

The defendant Withers, in an action against Newsom, on proof of the facts stated, would be entitled to recover damages for the fraud practised. Such a suit may be maintained without any offer to return the goods sold. *Fielder v. Star-kin*, 1 H. Bl., 17; *Patteshall v. Tranter*, 3 Ad. & Ell., 106; *Caswell v. Coare*, 1 Taunt., 566; 2 Kent, Com., 480, n.

In an action by payee against the maker of a note, it is competent for the maker, in reduction of damages, to prove that the sale was effected by means of false representations on the part of the payee, although the chattel has not been returned or tendered to him. *Harrington v. Stratton*, 22 Pick. (Mass.), 510; *Parish v. Stone*, 14 Id., 198; *McAllister v. Reab*, 4 Wend. (N. Y.), 483; *Spalding v. Vandercock*, 2 Id., 431; *Burton v. Stewart*, 3 Id., 236; *Miller v. Smith*, 1 Mason, 437.

It is stated by Chief Justice Mansfield, in 1 Taunton, that the rule which allows fraud or breach of warranty to be given in evidence in mitigation of damages, arises from the desire

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to avoid circuitry of action. Under the statute of Alabama, and the rule established in *Peden v. Moore*, the defence in this case is admissible *a fortiori*. In Mississippi, where there is a similar statute, the same rule prevails. *Harman v. Sanderson*, 6 Sm. & M., 41, 42.

The modern English cases have greatly relaxed the ancient rule on the subject of rescission of contracts for sales of personal property. *Poulton v. Lattimore*, 9 Barn. & C., 269; *Steward v. Coesvelt*, 1 Carr. & P., 23; *Percival v. Blake*, 2 Carr. & P., 514; Chit. on Cont., 463, 743, ed. 1848.

In the case of *Parish v. Stone*, 14 Pick. (Mass.), 198, and *Harrington v. Stratton*, 22 Id., 516, and in *Peden v. Moore*, the English cases are reviewed, and I submit that it is clearly shown that the technical reasons on which the decisions were founded cannot be justified, and do not apply, where the authority to make the defence is given, as here by the statute. If it shall be held that the worthlessness of the fillies sold to the defendant does not constitute a total failure of consideration, because they were, or might have been, of value, for the plough or otherwise, to the vendor, and it shall also be held that the excuse offered by the vendee for his failure to return is insufficient, he is still entitled to an abatement. *Beecker and *Beecker v. Vrooman*, 13 Johns. (N. Y.), 302, [219 303, and cases cited; *Lewis v. Cosgrave*, 2 Taunt., 2, [*219 3. In this case the court held, that, "as it was clearly a fraud, and a man cannot recover the price of goods sold under a fraud, a new trial should be granted." Any defence which in England may be made in assumpsit for the price of the goods sold may be made in Alabama, under her statute, in a suit on a sealed bill, for the purchase-money.

The utmost effect, therefore, which can be given to the failure to offer to return is, that the defendant cannot rescind the contract *in toto*, avoid the payment of the note in suit, and recover back the money paid, if the property be of any value. But he is entitled to such abatement in mitigation of damages, if sued in assumpsit, or by virtue of his special plea, if sued in debt, as the price exceeded the fair value of the goods sold.

And this conclusion entirely conforms to the principle on which the duty to return is founded, to put the parties, as near as may be, *in statu quo*. It avoids circuitry of action, and gives to the plaintiff a fair value for his property, fraudulently sold at a price extravagantly beyond it. The sum already paid would, without doubt, have been decided by the jury, if submitted to them, to be rather more than a fair price for the property sold, on the facts admitted in this case.

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Mr. Bayly, for the defendant in error, contended that the defendant ought to have returned or offered to return the property, and that this should have been done immediately upon the discovery of the fraud. 12 Wheat., 183; 2 Kent, Com., 480; 1 Campb., 190; 4 Mass., 402; 15 Id., 319. He who would rescind a contract must put the other party in as good a situation as he was before; otherwise he cannot do it. Chit. on Contr., 276; *Hunt v. Silk*, 5 East, 449; *Conner v. Henderson*, 15 Mass., 314.

Many other authorities might be added to the same effect, but, on a subject on which the cases are so numerous and so entirely uniform, it will be sufficient to give a reference to a few of them, without citing them at large. See *Pulsifer v. Hotchkiss*, 12 Conn., 234; *Masson v. Bovet*, 1 Den. (N. Y.), 69; *Coolidge v. Brigham*, 1 Met. (Mass.), 547; *People v. Niagara C. P.*, 12 Wend. (N. Y.), 246; *Barnett v. Stanton*, 2 Ala., 181, 195; *Minor v. Kelly*, 5 Mon. (Ky.), 272.

Moreover, this ought not to have been a plea in bar of the whole action. The question what the fillies were worth was one for the jury to decide. In the cases cited by the opposite counsel, the plea went merely to the diminution of damages, instead of being in bar of the whole claim.

*220] *Mr. Justice DANIEL delivered the opinion of the court. •

This cause, from the District Court of the United States for the Middle District of Alabama, is brought here under the act of Congress of 8th August, 1846, ch. 104.

The plaintiff in error was sued in the court below, upon a single bill for the sum of \$3,000, executed by him on the 16th of February, 1839, payable on the 1st of January ensuing, to A. B. Newsom or order, and which was assigned by Newsom to May, the testator of the defendant.

What were the grounds of defence first assumed by the defendant does not appear, and it is immaterial now to inquire. The pleas first filed were by consent of parties withdrawn, and by leave of court the defendant filed a special plea, averring that the note sued on was given by him for a part of the price of two fillies purchased by him of Newsom for \$4,000; that Newsom falsely and fraudulently represented to the defendant that these fillies were reared by himself; that they were sound and of a high pedigree (as is set forth in the plea); that the defendant, desiring to possess these fillies for their blood and for the turf, and induced and deceived by the false representations of Newsom, paid him the sum of \$1,000 in cash, and executed the note in question for the residue of the purchase-

money; that the representations of Newsom as to the fillies having been reared by him, of their soundness, and of their pedigree, were all untrue, and all known to be untrue by Newsom at the time of the sale; that the defendant did not ascertain either the extent of the unsoundness of these fillies, or the falsehood of the pretended pedigree, until during the autumn and winter of the year 1839; that the said Newsom at the time of the sale resided, and has continued to reside, in a different State, and more than three hundred miles from the defendant; that from the time of discovery by the defendant of the unsoundness of the fillies, and of the falsehood of their pedigree, up to the time of their death, which happened without any fault of the defendant or his servants, in the spring of 1840, he, the defendant, was willing and ready, and desirous, of returning the fillies to the said Newsom, but never had an opportunity of so doing. The plea concludes with stating, that the note or writing obligatory was obtained from him by Newsom by his false and fraudulent representations, and is therefore void; and with a prayer whether defendant should be charged with the debt. To this plea there was a demurrer by the plaintiff below, and the judgment of the court below sustaining the demurrer, brought hither by a writ of error, this court is called on to examine.

*Although the legal principles and inquiries involved in this cause are to a great extent local in [*221 their character and operation, it will be found to embrace rules, both with respect to pleading and to the interpretation of contracts, extending in some respects beyond the influence of merely local jurisprudence. The contract in question having been made within the State of Alabama, and designed to be performed within that State, the *lex loci contractus* must justly be understood as entering into and controlling the effect of its stipulations, and having been sued upon within the same State, the *lex fori* must, in a degree, regulate the mode of its enforcement.

By a statute of Alabama (see Aikin, Dig., p. 283, § 138), it is enacted, "that, whensoever any suit is depending in any of the courts founded on any writing under the seal of the person to be charged therewith, it shall be lawful for the defendant or defendants therein, by a special plea, to impeach or go into the consideration of such bond, in the same manner as if the said writing had not been sealed." By another statutory provision of the same State it is declared (see Aikin, Dig., p. 328, § 6), "that all bonds, obligations, bills single, promissory notes, and other writings, for the pay-

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ment of money or any other thing, may be assigned by indorsement, whether the same be made payable to the order or assigns or the obligee or payee or not; and the assignee may sue in his own name, and maintain any action which the obligee or payee might have maintained thereon previous to assignment, and in all actions to be commenced and sued upon any such assigned bond, obligation, bill single, promissory note, or other writing aforesaid, the defendant shall be allowed the benefit of all payments, discounts, and set-offs, made, had, or possessed against the same, previous to notice of the assignment, in the same manner as if the same had been sued and prosecuted by the obligee or payee therein." By the enactment herein first cited, it is obvious that specialties are divested of any force or solemnity at any time ascribed to them by reason of their having a seal annexed, and are placed, with respect to all inquiries which may be instituted into the validity of their consideration, precisely upon the footing of parol agreements. With respect to the construction of the second provision (§ 6) of the statute above cited, the question has been suggested, whether the right conferred by the first enactment, to inquire into the consideration of contracts in contests between the original parties, is extended, by the correct meaning of the statute, to the defence allowed to obligors at the suit of assignees, or whether obligors in assigned bonds, notes, &c., are not restricted in their defence *222] to *transactions posterior in date to the writing itself, and forming no necessary part of the original consideration, the language of the statute, as already quoted, being this:—"shall be allowed the benefit of all payments, discounts, and set-offs, made, had, or possessed against the same" (i. e., against the bonds) "previous to notice of assignment, in the same manner as if the same had been sued and prosecuted by the obligee therein."

In construing these provisions of the Alabama statute as being *in pari materia*, we cannot regard them as changing the rights of the parties arising out of the contract itself, nor as conferring new rights on others not inherent in such original obligations, but we regard them rather as securing those rights, except so far as they may have been legally and justly transferred. There could be no doubt of the right to impeach the consideration, or the right to claim the benefit of payments, set-offs, or discounts, on the part of the obligor as against his obligee. The statute was not designed to take from the obligor any of these rights, but merely to deny to him the claim to discharge his obligation by payments, &c., to the original obligee, after he knew the obligation to have been

transferred to another. Neither did the statute create in the assignee any new right varying the character of the contract itself. It conferred on him merely the rights to take by assignment, and to sue in his own name,—in effect, the power to acquire in the mode prescribed an equitable title, and to prosecute that title in a court of law. Contracts at common law, to which this simple power of assignment is extended by statute, differ essentially from those which arise out of and are governed by the law merchant, or from such as are placed on the footing of the law merchant by express legislative enactment. We conclude, then, that, in a case like the present, the obligor would have the right to impeach the consideration for which the writing was given, or to show its discharge by payments or set-offs made or existing at any time before notice of assignment, or by discounts to prove either a total or partial failure of the consideration for which the writing was executed, accordingly as the truth of the case would warrant either defence. This interpretation of the law we consider as accordant, not only with the language and the rational meaning of the statute, but as sustained by the decisions of the courts in the State whose peculiar policy we are discussing, and by decisions in other States upon statutes containing provisions similar to those in the statute of Alabama. Recurring to the latter statute itself, its terms declare that whensoever, that is, in every case, in which suits shall be instituted founded on any writing under seal, the *person to be charged therewith, comprehending every [*223 and any person, whether he sustains a relation to an assignee or to any other person, may impeach the consideration of the bond or other writing (Aikin, Dig., p. 233, § 138), and then proceed with respect to the rights and powers of the assignee to provide, that he may sue in his own name, and may maintain any action which the obligee or payee might have maintained thereon, previous to assignment (Aikin, Dig., p. 328, § 6); he has the same rights and remedies which pertained to the obligee or payee, and none other.

And first, with respect to the defence as against the assignee, founded on the total failure of consideration, it has been ruled under the statute of Alabama, in the case of *Clements v. Loggins*, 2 Ala., 514, that, when the payee of a note is inquired of by one wishing to purchase it, whether he has any defence against it, and answers that he has none, he does not thereby preclude himself from making any defence against the note growing out of the original transaction, of which he had no knowledge at the time. And it will be found that the example put by the court in this case (see p.

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519) is one of total failure of consideration. Yet this defence could never be permitted if it is to be sought for within a narrow interpretation of the words *payments*, *set-offs*, and *discounts*,—such a one as would not embrace the true character of the transaction. Again, in the case of *Wilson v. Jordan*, in 3 Stew. & P. (Ala.), it is said by the court, on p. 98,—“The decisions of this court have gone far to abolish the distinction with us between the effect of a partial and total failure of consideration”; and again, the court uses this language:—“Nor do we feel the least dissatisfaction with our former decisions, so far as they tend to place partial and total failure of consideration on the same footing, instead of driving the parties to circuity of action.” The doctrines ruled by the Supreme Court of Alabama are closely coincident with those of the courts of other States, in the construction of statutes similar to that of the former State. Thus, in the case of *Clements v. Loggins*, 2 Ala., 514, as late as 1841, the court, by way of illustration, refer to the cases of *Buckner v. Stubblefield*, 1 Wash. (Va.), 296, and of *Hoomes v. Smock*, Id., 390, decided by the Court of Appeals upon the Virginia statute, a law more restrictive in its terms than is the Alabama statute, as the former speaks only of just discounts against the obligee, being silent as to payment and set-off, (see 3 Stat. at L., 379; 4 Id., 275; 6 Id., 87; 12 Id., 358, and Acts of 1795, and of January, 1820,) and both the cases thus referred to are instances of entire want of consideration, the writings assigned having been void *ab initio*.

*224] It seems proper in this place to advert to an opinion of the Supreme Court of Virginia, in one of the earlier cases before them under the statute, with respect to any change which that statute might have been supposed to produce in the relative situations of parties to contracts made assignable thereby. In the case of *Norton v. Rose*, in 1796, reported in 2 Wash. (Va.), the law (on page 248) is thus expounded by Roane, Justice, with the concurrence of the whole court:—“It was not intended to abridge the rights of the obligor, or to enlarge those of the assignee beyond that of suing in his own name; and since it is clear that, prior to this law, an original equity attached to the bond followed it into the hands of the assignee, this law does not expressly, nor by implication, destroy that principle.” The same doctrine was ruled in Pennsylvania, as early as the year 1776, in the case of *Wheeler v. Hughes*, reported in 1 Dall., 27. In Pennsylvania, bonds, bills, and promissory notes were by act of Assembly made assignable, as promissory notes in England under the 3d and 4th of Anne, but as the statute of Pennsylvania

omitted to declare that those writings "should be placed upon the footing of bills of exchange," it was therefore decided that the assignee of such writing stood in the same place as his obligee or payee, so as to let in every defalcation which the obligor had against him before notice of the assignment, and that the only intent of the act of Assembly was to enable the assignee to sue in his own name, and to prevent the obligee from releasing after notice of assignment. This doctrine has been frequently reaffirmed in the same State, as will be seen in 2 Dall., 45 ; 6 Serg. & R., 175, and 16 Id., 20.

Turning next to a class of cases founded on what has been denominated the partial failure of consideration, although involving bad faith, breach of warranty, false and deceitful warranties, false representations in the procuring of contracts, such as might in particular aspects extend to the entire rescission of contracts, it will be seen that the Supreme Court of Alabama have, in the construction of their statute, ruled that a defence founded on either or on all of the facts here enumerated shall be admissible in diminution of damages. And in allowing this mode of defence, which seems to fall more strictly within the import of the terms *set-offs* and *discounts* than objections aimed at the total abrogation of contracts can do, the courts of Alabama have acted in accordance with those of other States in construing statutes similar to their own, consistently, too, with the principles of reason and justice adopted by modern tribunals when acting apart from statutory provisions. The case of *Moorehead v. Gayle*, reported in 2 Stew. & P. (Ala.), 224, was *an action by the assignee against the maker of a promissory note, given [*225 for the price of a slave warranted sound. The defence set up was the unsoundness of the slave at the time of the contract, as evinced by his early death and by other circumstances. The court in this case say, that, if it had been necessary to offer to return the slave to permit this defence, yet by the early and sudden death of the slave the vendee would, under the circumstances, have been excused from making the offer ; and in considering the right of the vendee to avail himself of the defence, either of a total or partial failure of consideration, the court are led to compare the principle enunciated in the case of *Thornton v. Wynn*, in 12 Wheat., 183, with the doctrine as laid down in the State of Alabama under her laws, and with respect to the rule of *Thornton v. Wynn* remark as follows:—"It was the most rigid that has anywhere prevailed against relief by way of defence to the action at law. It was doubtless adopted as a part of the system which has been exploded in this State and in many States of the Union, as well

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as in several of the English courts, that a partial failure of consideration is not a defence to an action at law, brought to recover the price of the article sold, but that in such cases the vendee must resort to his cross action, which remedy, on account of its dilatory nature and circuitous form, is by this court and many others of high authority deemed inconsistent with justice, and the more correct rules of modern practice."

The earlier case of *Peden v. Moore*, reported in 1 Stew. & Port. (Ala.), 71, furnishes a still more full exposition, by the Supreme Court of Alabama, of the rules of decision deducible from the law of that State. The action in *Peden v. Moore* was brought to recover the amount of a promissory note. The defence pleaded was failure of consideration, payment, and set-off;—whether total or partial failure of consideration does not appear in the form of the pleading, and it would seem that, so far as the form of pleading was involved, the fact of the failure being total or partial was deemed immaterial by the courts, and was a question of proof, inasmuch as the court below regarded as allowable, and even as indispensable, proof of total failure, whilst the Supreme Court decided that proof of partial failure was admissible, and that the exclusion of such proof in that case was error in the inferior court. The defendant below moved the court to instruct the jury, that, if they believed the consideration had failed, except to the amount which had been paid, they should find a verdict for the defendant. This the court refused, but instructed the jury, that, unless a total failure of consideration *226] was proved, they should find a verdict for *the plaintiff. In reviewing the opinion of the court below, the Supreme Court of Alabama say,—“It is our policy to avoid circuity of action, that litigation may be stopped in the germ, before it is permitted to put forth its branches. This idea is most strikingly illustrated by our statutes providing for arbitration and set-off, as well as by the decisions of our courts. Now, to permit a defendant to allege in diminution of a sum sought to be recovered by breach of his contract, that the consideration which induced the contract on his part has partially failed, would have the effect of making one action subserve the purpose of two, and upon the score of convenience it must be unimportant to the plaintiff whether his recovery is diminished, or whether, after having recovered the entire sum, he is compelled to refund a portion of it; or, if important, the importance would consist in ending litigation, and avoiding the costs of the defendant's action. And surely it would be more compatible with justice, to permit

a party to retain that which *ex equo et bono* cannot be demanded of him, and which by law he may recover back; and more especially, when none of the great principles of right or the landmarks of property would be disturbed. Perhaps it may be said, that the inquiry is too complex for the determination of an ordinary jury. Not so. There would be no more difficulty in ascertaining the sum to be deducted from the defendant's indebtedness, than in admeasuring the quantum of the damages sustained in an action for a false warranty, or for a deceit. In either case, the jury will naturally inquire the sum which was agreed to be paid, and to what extent the consideration is deficient; so that the obstacles to the achievement of justice will not be greater in the one instance than in the other. We are entirely aware of the decisions which inhibit the defence even of a total failure where there is a warranty on which the defendant may have his remedy. These decisions doubtless proceed upon the principle, that the warranty is a subsisting contract, and the damages sustained by its breach unliquidated. We consider them, however, so far shaken, if not overruled, as to leave the question open for examination. Upon authority, both in point of respectability and numbers, it is clearly provable that, where fraud enters into the transaction, it is competent for the defendant, upon proof of it, to show a defect in the consideration in diminution of damages. This qualified admission of the defence originated from the rule, that fraud avoids the contract *ab initio*. In point of justice, we can discover no sufficient reason for permitting the defence to be set up where there is a fraud in the transaction, and in denying it when there is a false warranty *unaccompanied by fraud. In either case, it is the duty of the jury to graduate the plaintiff's recovery by the injury which the defendant has sustained; for the old common-law notion, that fraud so vitiated every contract which partook of it as not to allow of a recovery, though it but partially impaired the benefit which the defendant expected to derive, has been exploded; more recent authority only allowing it to go in reduction of damages. The cases of *Poulton v. Lattimore*, 9 Barn. & C., 259, of *Germaine v. Burton*, 4 Stark., 32, and *Miller v. Smith*, 1 Mason, 437, are cases in which the defendant had the plaintiff's warranty, yet this circumstance is not considered by the courts which decided them as interposing an obstacle to the defence!" The court, in conclusion, with respect to this defence, remark,— "Believing, therefore, that the greater benefit would result from its toleration, we are of opinion, that wherever a defendant can maintain a cross action for damages on account

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of a defect in personal property purchased by him, or of a non-compliance by the plaintiff with his part of the contract, he may, in defence to an action upon his note made in consequence of such purchase or contract, claim a deduction corresponding with the injury he has sustained."

These copious extracts from the opinions of the Supreme Court of Alabama are thought to be warranted, not only on account of the intrinsic force of the reasoning they contain, but still more so, perhaps, from the fact that they present the best and most authoritative interpretation of the statutes they are meant to expound, as well as of the policy in which those statutes have had their origin. But beyond the influence and effect of these decisions as expositions of local law, they may be regarded as coincident with the doctrines promulgated by the highest tribunals of a portion at least of the States of the Union, and as not conflicting, in principle at least, with some of the later opinions of the English bench. By the earlier English decisions the following principles appear to have been inflexibly ruled, viz.:—That whenever a contract was tainted by fraud, it never could, if this were shown, be made the foundation of a recovery to any extent, but must be set aside *in toto*. That in all instances wherein a party was injured either by a partial failure of consideration for the contract, or by the non-fulfilment of the contract, or of a warranty, the person so injured could not defend himself, in an action on the contract, by proving these facts, but could find redress only in a cross action against the plaintiff. These rules of the common-law courts appear to have yielded materially to the influence of common sense and common convenience. An example of this may be *perceived in

*228] the permission given in cases where a recovery is sought upon the principle of *quantum meruit*, to set up as a defence that the plaintiff has unfairly, or injuriously, or imperfectly fulfilled his obligations towards the defendant, and that he should in such cases recover so far only as he could prove a meritorious performance; admitting, in these instances at least, the defence founded on discount or on a partial failure of consideration, or a dishonest performance. See the cases of *Basten v. Butter*, 7 East, 479; of *Farnsworth v. Garrard*, 1 Campb., 38; of *Denew v. Daverell*, 3 Id., 451; of *Poulton v. Lattimore*, 9 Barn. & C., 259. In the case of *King v. Boston*, 7 East, 481, on a note, the plaintiff had sold a horse to the defendant, warranted sound, for twelve guineas, of which the defendant had paid three. In fact, the horse was not sound, and, the defendant refusing to pay more, this action was brought for the value of the horse to recover the

difference. It was proved that the horse at the time of the sale was not worth more than £1 11s. 6d., and that the defendant had sold him for £1 10s. Lord Kenyon held that the plaintiff could only recover the value, and more having been paid him by the defendant, he non-suited the plaintiff. *Caswell v. Coare*, 1 Taunt., 566, was an action upon a warranty of a horse. It was ruled in this case, that, if the horse is not returned, the measure of damage is the difference between his true value and the price given, which may be shown. Indeed, the ground on which the English judges have restricted this species of defence to cases of *quantum meruit* implies the admission, that there is nothing in the character of the defence itself, with respect to express undertakings, that is inconsistent with justice or with the true obligations and duties of the contracting parties. The objection is this,—that if in suits on contracts for specific undertakings, and for stipulated compensation, the defendant could, under the general issue, be let in to show either failure of consideration or non-performance, the plea not disclosing either ground, would effect a surprise upon the plaintiff; but that where, as on a *quantum meruit*, the plaintiff was to show a meritorious cause of recovery, he must come prepared to encounter any and all objections in conflict with the position he assumes and must maintain. With all the respect due to the learned men by whom this distinction is made, it may be permitted to doubt whether it is not perhaps more apparent and technical than real; for it may be asked, whether, in cases of contract for specific performances and for stipulated equivalents, the plaintiff is not equally bound to prove an honest performance,—such a one as comes up to the equivalent promised by the *defendant? Indeed, it would seem, so far as danger of surprise is to be apprehended, that where the rights [229] and duties of parties were set forth in the contract, and in the pleadings founded upon the contract, there would be less danger of surprise than there possibly could be in instances where the forms of proceeding indicated neither, but where every thing was left open to contest at the trial.

The remarks of some of the English judges appear to be peculiarly applicable to this view of the subject. Lawrence, J., in *Basten v. Butter*, 7 East, 484, speaking of the distinction attempted between a *quantum meruit* and other forms of action, says,—“The rule laid down by Mr. Justice Buller may be a good one, if the plaintiff has had no notice of the kind of defence intended to be set up against his demand. But even there, if the plaintiff have previous notice that the defendant means to dispute the goodness or value of the

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work done, I think the defendant ought to be let in to his defence. For, after all, considering the matter fairly, if the work stipulated for at a certain price were not properly executed, the plaintiff would not have done that which he would have engaged to do; the doing of which would be the consideration for the defendant's promise to pay, and the foundation on which his claim to the price stipulated for would rest; and therefore, especially if he should have notice that the defendant resists payment on that ground, he ought to come prepared with proof that the work was properly done." And Le Blanc, Justice, remarked,—“I think that in either case the plaintiff must be prepared to show that his work was properly done, if that be disputed, in order to prove that he is entitled to his reward; otherwise, he has not performed that which he undertook to do, and the consideration fails. And I think it is competent to the defendant to enter into such a defence, as well where the agreement is to do the work for such a sum, as where it is general to do such work. If a man contracted with another to build him a house for a certain sum, it surely would not be sufficient for the plaintiff to show that he had put together such a quantity of brick and timber in the shape of a house, if it could be shown that it fell down the next day; but that he had done the stipulated work according to his contract. And it is open to the defendant to prove that it was executed in such a manner as to be of no value at all to him, or not to be of the value claimed.”

It would seem, then, to be fairly deducible from the reasoning of the English judges, from the case of *Basten v. Butter*, in 7 East, decided in 1806, to that of *Poulton v. Latimore*, 9 Barn. & C., ruled in 1829, that this defence would *230] by those *judges themselves be deemed permissible, whenever it could be alleged without danger of surprise, and consistently with safety to the real rights of the parties; and it appears to be a deduction equally regular, that, where notice of the defence was given, either by pleading or by any other effectual proceeding, neither surprise nor any other invasion of the rights of the parties could occur, or be reasonably apprehended. But however the rule laid down by the courts in England should be understood, it has repeatedly been decided by learned and able judges in our own country, when acting, too, not in virtue of a statutory license or provision, but upon the principles of justice and convenience, and with the view of preventing litigation and expense, that where fraud has occurred in obtaining or in the performance of contracts, or where there has been a

failure of consideration, total or partial, or a breach of warranty, fraudulent or otherwise, all or any of these facts may be relied on in defence by a party, when sued upon such contracts; and that he shall not be driven to assert them either for protection, or as a ground for compensation in a cross action. Thus, in the case of *Runyan v. Nichols*, 11 Johns. (N. Y.), 547, the Supreme Court of New York decide, that, in an action upon an attorney's bill, the defendant might give evidence of neglect of duty on the part of the plaintiff, if this defence was set up by plea, or after a notice to the same effect given to the plaintiff before the trial. In *Beecker v. Vrooman*, 13 Johns. (N. Y.), 302, it was decided by the same court, that, in an action for the price of a chattel, the defendant may prove a deceit in the sale, and that the chattel was of no value, and thus defeat the plaintiff's action; or, if the defect produce merely a partial diminution of the value, he may show that in mitigation of damages. In the case of *Sill v. Rood*, 15 Johns. (N. Y.), 230, which was an action on a promissory note given for the price of a chattel, the defendant was allowed, under the general issue, to show deceit in the sale. And it was holden further, that a promissory note given for the price of a chattel represented to be valuable, when in truth it was of no value, is without consideration and void. In the case of *Grant v. Button*, 14 Johns. (N. Y.), 377, the suit was for the price of work and labor, and it was ruled that the defendant, in order to reduce the amount of the plaintiff's claim, might show that the work was not done faithfully and in a workmanlike manner. This, too, was the case of a contract for an agreed price. In *Spalding v. Vandercook*, 2 Wend. (N. Y.), 432, Chief Justice Savage, in delivering the opinion of the court, says,—“In *Beecker v. Vrooman*, 13 Johns. (N. Y.), 302, it is settled that deceit in a sale of a chattel may be shown in bar or in mitigation. The doctrine *of the cases just cited, deduced from principles of justice and from the beneficial purpose of preventing circuity of action, would seem to apply with decisive influence to subjects falling within the range of a polity, by which those doctrines were peculiarly and authoritatively commended. We cannot doubt, therefore, after a full examination of the questions on this record, that, under the provisions of the statute of Alabama pleaded in this case, the plaintiff in error had the right to rely in his defence, either upon a fraud practised on him in the formation of his contract, or on a false or fraudulent warranty, or on a total or partial failure of the consideration on which the contract was entered into by him, or on any payments, discounts, or

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set-offs, in the language of the statute, "made, had, or possessed by him," provided that the three last grounds of defence shall have come into existence, and been justly belonging to the plaintiff in error, before he had notice of the assignment of his obligation.

A doubt has been suggested as to the power of the plaintiff in error to defend himself, by reason either of fraud or of failure of consideration,—a doubt arising, not from any want of verity of the facts in either of those averments, but from the form of the pleadings in the cause. Thus it is said, that, if he designed to avoid the contract for fraud, he should have averred his disclaimer immediately on a discovery of the fraud, and his proffer to restore the property to the defendant in error, which it is thought the plea has not done. Secondly, it has been supposed that, if a diminution of the price alone was intended, the plea should not have concluded with averring that the writing was procured by false and fraudulent representations, and was therefore void; or with a general prayer for judgment whether the defendant below should be charged, &c. With respect to pleas in bar, it may be premised, that they are never construed with the severity which is applied in testing pleas that are merely dilatory. If, by rational intendment, they meet the cause of action, or, in the quaint phrase of the old writers, they are certain to a general intent, they are deemed sufficient. If their structure merely, and not their substance, is to be assailed, this must be done by a special demurrer; a proceeding by no means favored, as it has rarely any real relation to the merits of the controversy. The averments in this plea with respect to the readiness to return the property are these:—First, that the defendant below resided at a greater distance than three hundred miles from the plaintiff, and in a different State. Secondly, that, from the time at which the defendant below discovered *232] the unsoundness of the fillies, and the falsehood of *their pedigree, he was ready and willing, and desirous, to return them, and would have returned them to the plaintiff, if he had had an opportunity of so doing, which he had not. The law requires of no man that which is unreasonable or impracticable. *Lex neminem cogit ad vana seu impossibilia*. In this case, the defendant below avers his want of power to rid himself of that which he also avers had been fraudulently imposed upon him, and the plaintiff by his demurrer admits the fact, and the character of the fact, as set out in the plea. But it has been said, that the defendant below might have tendered a return of the property by notice through the post-office, and was therefore bound to do so.

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It may be inquired, whether this position does not involve a *petitio principii*. Does not the averment of absolute destitution of the power to return the property imply the absence of all the means leading to that measure, and carry with it the necessary inference of ignorance of the locality of the plaintiff, or of his post-office? A letter directed to the State of Tennessee, generally, or to some place more than three hundred miles from the defendant below, and in a different State, might, and probably would, have been as unavailable for any practical purpose as a letter addressed to the State of New Hampshire. The plaintiff in error has averred his inability to return the property, and the defendant in error admits the truth of the averment. But the objection to this issue in law is properly applicable only to that aspect of the case which places the rights of the plaintiff below exclusively on the ground of a total rescission of the contract. If the purchaser chose to retain the property, and either to sue upon the warranty of pedigree and soundness, or to defend himself upon the ground of difference between the true and the pretended value of the property, he was bound neither to give immediate notice, nor to tender a return of the property; he would be permitted to discount the difference between the real and the simulated value. But here the difficulty already mentioned is suggested, namely, that this defence is inconsistent with the conclusion of the plea, which says, "and said defendant saith, that the said sealed note or writing obligatory was obtained from him by the said Newsom, by false and fraudulent representations as aforesaid, and is therefore fraudulent and void in law, wherefore said defendant prays judgment whether he ought to be charged with said debt," &c. This conclusion is said to call for an entire rescission of the contract, as founded in fraud, and cannot be reconciled with the facts previously stated as constituting a cause for partial relief.

We have already said, that pleas in bar are to receive, if not *a liberal, certainly not a narrow and merely technical construction; and we will further observe, that, [*233 if the difficulty suggested be sound, there never could be a defence in mitigation of damages, where there should be alleged fraud in the inception of the contract, or where there should be a false or deceitful warranty, however willing the defendant might be to accept the difference between the real and the pretended value, and however circumstances might place it beyond his power to return the property. The injured party would in all cases be driven to repudiate the whole contract, or to go without compensation. This course,

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however, we have seen, is in contravention of the current of decisions which admit of the defence in mitigation of damages. But pleas in bar are always construed according to their entire subject matter, and will be sustained accordingly, as taken altogether, and will not be determined by a disjoining of their members, or by laying stress on what may be immaterial. It seems, moreover, that the prayer for judgment, or conclusion of such pleas, is not considered as essential to their validity. Thus it is stated by Chitty, Vol. I., p. 558, speaking of pleas in bar, "that this prayer, before the recent rule," (alluding to the rules of pleading adopted in England in the 4th of William IV.,) "ought properly to have corresponded with, and been founded upon, the commencement of the plea, and the effect of the matter contained in the body of it"; but, continues this author, "as the court would *ex officio* give judgment in favor of the defendant according to the substance of the plea, without reference to the conclusion, an error with regard to the prayer of judgment in the concluding part of the plea was not material, except in the case of a plea in abatement. In the case of *The King v. Shakespeare*, 10 East, 87, upon a demurrer to a plea in abatement, Lord Ellenborough said,—"Praying judgment of the indictment means no more than praying judgment *on* the indictment: and if this were the case of a plea in bar, the court would give that judgment which, upon the whole record, appeared to be the proper judgment, though not prayed for by the party. But in abatement the court will give no other than the proper judgment prayed for by the party, and without the defendant prays a particular and proper judgment in abatement, the court are not bound to give the proper judgment upon the whole record, as they would be in the case of pleas in bar." In *Attwood v. Davis*, 1 Barn. & Ald., 173, it is said by Bayley, Justice, that "there is a distinction between a plea in bar and a plea in abatement; in the former, the party may have a right judgment upon a wrong prayer, but not in the latter." In the case of *Rowles v. Lusty*, *234] 4 Bingh., 428, upon a writ of entry, it was ruled, that the prayer for judgment for the messuages and land in the count did not vitiate the plea, notwithstanding the commencement of the plea applied only to the messuages and parcel of the land. And in this last case, *The King v. Shakespeare* and *Attwood v. Davis* are cited as authority.

But again, (and this appears to give a conclusive answer to any objection to the admission here of proofs in diminution of damages,) if we must treat this case according to the strictest rules of pleading, it might be said that the plea aver-

ring the note to have been obtained by fraud, which is admitted by the demurrer, would be sufficient to entitle the defendant below to a judgment on a declaration counting merely on the note, without regard to the question of total or partial rescission of the original contract. And then, if the plaintiff could be entitled to recover at all, it must be on a count on the original contract, or on a *quantum valebat* for the thing sold. And this would open the entire range of inquiry as to the character of the contract, and as to what in truth constituted the *quantum valebat* on which, if on any thing, the plaintiff could found himself.

Upon this branch of the case, we think the matter averred in the special plea of the defendant below was legitimately pleaded under the statute, and with sufficient certainty and pertinence to authorize a defence on the grounds of a false and deceitful warranty, or of a partial failure of consideration, and that he should have been let in to sustain, if he could, such a defence before the jury. We therefore consider the judgment of the District Court to be erroneous, and do adjudge that the same be reversed, and that this cause be remanded to that court, with instructions to cause an issue to be made up on the special plea filed by the defendant below, under the statute of Alabama, and a *venire facias* to be awarded to try that issue.

*Mr. Justice NELSON dissented.

I am obliged to dissent from the judgment of the [*661 court in this case. I agree to the principles of law, generally, as expounded in the opinion delivered; but cannot agree to the application that has been given to them in deciding the case.

The defence turns upon the effect of the pleas, as there is a demurrer to each of them.

The first sets up fraud in the sale of the fillies in two particulars; namely, first, in representing that they were raised by the vendor and were sound, when, in fact, they were not raised by him, and were knowingly unsound. Second, that they were of a particular pedigree, which is set forth, when in fact they were not, and that well known to the vendor. The plea further avers, that the fillies were purchased upon the faith of these representations, and then concludes that the sealed note given for the purchase-money, was obtained by fraud, and is void in law.

The second plea is like the first, with the addition of an attempt to account for the omission to return, or to offer to return, the fillies on the discovery of the fraud. To this end

it is averred, that the vendee resided some three hundred miles distant; that the defendant did not discover the extent of the unsoundness until the fall after the purchase (which was made in February, 1839, and that he did not learn their pedigrees till the fall of 1839, or winter of 1839-40; that *662] from the time *of the discovery of the fraud he was ready and willing, and desirous, to return the fillies, if he had had an opportunity, which he had not; and that from the discovery of the fraud down to their death, which happened in the winter and spring of 1840, he was ready and willing to return them.

Now, there were two lines of defence to this action for the purchase-money, either of which it was competent for the defendant to avail himself of by proper pleadings, as has been fully shown in the opinion of my brother Daniel, and need not be repeated; namely, first, a rescindment of the contract of sale, and, second, a failure of consideration in whole or in part. Either of these grounds was available against the action, if fraud had been committed in the sale. But they stand on different principles, and depend upon a different state of facts.

As to the first, the rescindment, which, of course, goes to the whole cause of action, as the contract is avoided altogether, it is indispensable that the defendant should return, or tender a return, of the property, within a reasonable time after the discovery of the fraud. And in this respect the law holds him to a strict compliance with the rule; he is not permitted to wait, and speculate upon the chances whether it would be best to return the property, and avoid the contract entirely, or to affirm it, and seek indemnity by way of damages. He must make his election at once.

Now which of these grounds of defence has the defendant sought to maintain by his pleas? Clearly, a rescindment of the contract. The first relies upon the fraud itself as an avoidance,—the second, the fraud, with an attempt to account for the omission of the offer to return. The first seeks to avoid the contract, and still keep the property; the second superadds a willingness to return. Both are defective, for want of the element essential to this line of defence, namely, a return, or an offer to return, the property. The first omits the averment entirely, and the averment in the second is altogether defective.

The fillies were kept several months, as is admitted in the plea, after the discovery of the fraud; and as to the distance of the vendor from the defendant, and difficulties in his way of tendering a return, the answer is, the rule of law imposes

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all that burden upon him, as a condition of rescindment. And if he is unable to comply with it, it is his misfortune, so far, at least, as it may compel him to resort to some other ground of defence. Certainly, it will afford no reasonable ground for avoiding the contract, and, at the same time, keeping the property.

*A return, or an offer to return, on the discovery of the fraud, is an indispensable element of the rule, and [*663 without which there can be no rescindment. A willingness to return, or a desire to return, uncommunicated to the vendor, will not do, and has no authority in the law.

The defence, then, must rest upon the failure of consideration, and which, I agree, is available to the defendant, whether it goes to the whole or in part, according to the law of Alabama, as well as the laws of most of the States, and latterly in the English courts.

But the question here is, not whether this is a good defence to the action, but whether the defence is that set up by the pleas. The only questions here arise upon them. We are confined to the grounds of defence as there set forth, and as there to be found, and to no others. And, as I think I have already shown, these place the defence upon the principle of the right to rescind the contract, to repudiate it altogether, denying any and every obligation under it.

The other ground of defence admits the contract, but seeks to diminish the extent or amount of the liability for the want of, or for a defect in, the consideration upon which it is founded. There is an appropriate plea for a defence of this description, and it is settled in the courts of Alabama that, under a plea of failure of consideration, a partial failure may be proved in abatement of the purchase-money. There are several cases to this effect. 1 Stew. & P. (Ala.), 71, 226, 242; 3 Id., 98; 3 Stew. (Ala.), 169, 170.

If the defendant intended to rely upon a failure of consideration as a ground of defence, there was a plea at hand according to the practice of the courts of that State. He need only have put in that plea, and given evidence of a total or partial failure. But the truth is, this is not the defence set up, or intended to be set up, but one going to the root of the contract itself,—a rescindment of it. And what I object is, having failed to maintain his pleas in that aspect, for want of a sufficient averment of an offer to return the property, that they shall be converted into pleas of failure of consideration; thus, in effect, holding them good in form for either line of defence—an avoidance of the contract by a return, or offer to return, or failure of consideration—in all cases of fraud in the

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sale of property. A plea defective as a rescindment of the contract in a single particular, namely, the offer to return, is transmuted into a good plea of want of failure of consideration.

I fear the decision will tend to unsettle principles and confound well established rules of pleading, so essential to the trial of causes understandingly, and in the orderly and methodical administration of justice.

For these reasons, I have felt compelled to enter my dissent to the judgment of the court.

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ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Alabama, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs, and that this cause be, and the same is hereby, remanded to the said Circuit Court, with instructions to cause *235] an issue to be *made upon the special plea filed by the defendant below, under the statute of Alabama, and to award a *venire facias de novo* to try that issue.

HIRAM BENNER, JOSEPH B. BROWNE, AND SALISBURY HALEY, ASSIGNEES OF ELEAZER P. HUNT, APPELLANTS,
v. JOSEPH Y. PORTER.

Whilst Florida was a Territory, Congress established courts there, in which cases appropriate to Federal and State jurisdictions were tried indiscriminately.

Florida was admitted into the Union as a State, on the 3d of March, 1845.

The constitution of the State provided, that all officers, civil and military, then holding their offices under the authority of the United States, should continue to hold them until superseded under the State constitution.¹

But this article did not continue the existence of courts which had been created, as part of the Territorial government, by Congress.²

In 1845, the Legislature of the State passed an act for the transfer from the Territorial to : State courts of all cases except those cognizable by the

¹ See *Calkin v. Cocke*, 14 How., 237.

² FOLLOWED. *McNulty v. Batt*, 10 How., 78. CITED. *Forsyth v. United States*, post, *576; *Clinton v. Englebrecht*, 13 Wall., 447; *Larkin v. Saf-*

farans, 15 Fed. Rep., 153. See *Baker v. Morton*, 12 Wall., 153; *Reynolds v. United States*, 8 Otto, 154; *McCann v. United States*, 2 Wyom. T., 298.

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Federal courts; and, in 1847, Congress provided for the transfer of these to the Federal courts.

Therefore, where the Territorial court took cognizance, in 1846, of a case of libel, it acted without any jurisdiction.³

The case of *Hunt v. Palao*, 4 How., 589, commented on and explained.

THIS was an appeal from the District Court of the United States for Florida.⁴

It originated in the Superior Court for the Southern District of Florida, in March, 1846, and was transferred to the United States District Court for Florida on the 14th of May, 1847.

On the 24th of March, 1846, Joseph Y. Porter filed a libel in admiralty against the appellants, in the Superior Court for the Southern District of the Territory of Florida, for the proceeds of the sloop Texas, charging that he had furnished supplies and stores to the master, at the port of Key West, whilst the vessel was engaged in the business of wrecking.

On the 22d of May, 1846, the Superior Court gave judgment for the libellant, for the sum of \$1,223.02.

On the 14th of May, 1847, the cause was transferred to the District Court of the United States, and an appeal prayed by the defendants to this court.

Upon this appeal the case came up.

It was argued by *Mr. Westcott* and *Mr. Gilpin*, for the appellants, and by *Mr. Jones*, for the appellee.

The counsel for the appellants made three points, of which it is only necessary to notice the first, as the decision of the court turned upon it.

*1. The first reason assigned for a reversal of this [*236 decree is that the Territorial court, established and organized in and for the Southern District of Florida, by the act of Congress of 1828, so far as it respects its jurisdiction of cases of Federal character, was abolished by the admission of Florida as a State, on the 3d of March, 1845. Congress could not, under the Constitution, continue such court after Florida became a State. The Federal courts in a State must be established and organized under and in conformity to the Constitution. They must be constitutional courts. The Territorial courts were not established under the provisions of the Federal Constitution relating to the judicial system. The Territorial judges were appointed for four years. The judges of the constitutional Federal courts in the States held

³ DISTINGUISHED. *United States v. Ritchie*, 17 How., 534.

⁴ See *Freeborn v. Smith*, 2 Wall., 173.

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their offices during good behaviour. This court has decided the question. (*American Insurance Co. v. Canter*, 1 Pet., 511; *Hunt v. Palao*, 4 How., 589.)

No Territorial statute was in force in 1845, investing any tribunal with admiralty jurisdiction. The act referred to in the case in 1 Peters had long been repealed, and Congress had exercised its right of legislation on that subject. The libel was filed in the court as a Federal court, and under the general law of admiralty. Neither the convention of the people of Florida that formed the State constitution, nor the Legislature of the State, possessed any power to provide for the continuance of the Territorial courts, as Federal courts, nor to interfere with cases exclusively of Federal jurisdiction, in any wise. No provision of the State constitution, or of any act of the State Legislature, could in any degree affect such cases, even as to their transfer to the Federal court organized after the State government went into operation. The State Legislature avoided such interference as to the transfer of the papers of "cases of Federal character and jurisdiction." (State Act of July, 1845, §§ 8, 11, 12, 13, and 14; Thompson's Digest, pp. 53, 54, &c.)

The continuance of the Territorial courts as Federal courts, after the Territorial government ceased to exist, was incompatible with the Federal Constitution. Those provisions of the Federal Constitution having reference to the Federal judiciary in the States, then became of force. Even the consent of a State could not justify a departure from the Constitution.

It has elsewhere been contended, that the act of Congress of the 3d of March, 1845, admitting Florida as a State, and the supplementary act of the same day, for the establishment of a Federal District Court (with Circuit jurisdiction) for *237] the whole *State, did not, *ex vi termini*, operate as a repeal of the acts establishing the Territorial courts, and annihilate those Territorial courts as Federal courts; but that such abolition of the Territorial courts then in existence was only effected when the constitutional Federal courts in the State were fully organized. This is the true question in this case, and is fairly stated. We contend that the Territorial courts, as Federal courts, were abolished the moment Florida was admitted as a State. The State constitution continued them as State courts only. It borrowed them from the Territorial organization, temporarily, till the permanent State courts should be organized by the Legislature, and the State judges elected, and all the authority of the Territorial judges to act a day after the admission of

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Florida as a State was derived from the State constitution, and from that alone.

In this case the suit was instituted, and the decree appealed from was made, after the State court were organized, and after the State Circuit Judge for the Southern District of Florida had been chosen, and the State courts there fully organized and in operation. The jurisdiction exercised by the Territorial judge was as a Federal court, in a case of exclusive Federal jurisdiction and character, and upon the ground that the Territorial court, as a Federal court, was not abolished until the term of four years, for which the judge had been appointed, had expired, or until he was superseded by the appointment of another Federal judge, to whom the jurisdiction of the Territorial court, of a Federal character, had been legally assigned by act of Congress. A law officer of the United States, in 1845, wrote an elaborate opinion in favor of the right of the Territorial judges to continue to try and decide cases of Federal character and jurisdiction. It was published in the newspapers, and is to be found in the *Daily Union* of the 5th of May, 1845, No. 4, Vol. I., which is in court for the use of the counsel for the appellee, if he desires to use it. The United States treasury officers continued to pay the salaries of the Territorial judicial officers of Federal appointment, it is believed, till the State Federal courts were organized. The printed opinion of the former Solicitor of the Treasury, referred to, will be allowed to pass for what it is worth, without any comment, unless the counsel for the appellee urges it as entitled to consideration. Nor is it deemed necessary to discuss the question whether an illegal payment of salaries of judges by the treasury can revive and continue courts that are by the law of the land defunct, and the existence of which would be inconsistent with the Constitution. It has been said, the course pursued has been sanctioned by *Congress, in the appropriation acts of 1845 and 1846; but it is sub- [*238 mitted that the allegation is not sustained by a reference to the acts; and, besides, as before argued, the power of Congress to continue the Territorial courts, as Federal courts, in the State, is denied. But so far from Congress intending to allow or sanction the continuance of these Territorial courts as Federal courts, after the 3d of March, 1845, and so far from its having passed any law confirming the acts of the judges, by the act of the 22d of February, 1847, ch. 17, the question now presented is expressly reserved for the decision of this court. (See section 8 of said act, Pamph. Laws of 1847, p. 24, ch. 17.)

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It has been suggested, that, if the arguments just urged are correct, this court will dismiss the appeal in this case without reversing the decree, upon the ground that the proceedings recited in the record were not the acts of a court, were not judicial proceedings, but acts of naked, unwarranted usurpation, utterly null and void, and that no appeal can lie from the decree, as the decree of a judicial tribunal. The suggestion is not deemed to be of very great importance. The decision of this court without a technical reversal of the decree made below, but declaring it to be a nullity for the reason stated, will be all-sufficient for appellants, and we are careless as to the disposition of the case here, consequent on such judgment. Our remedy in such case is plain. If we had paid the money on a void decree, we could recover it back. All parties are liable to us in damages; even the judge may not be exempt, if the case is so decided. But it is conceived that, the decree being rendered under color of judicial authority, and the appeal being taken under the eighth section of the act of Congress of February 22, 1847, ch. 17, before cited, which looks to the decision of this question by this court, and provides the appeal in order that it may be obtained, it is proper that the decree should be formally reversed and set aside, and the case sent back by the mandate of this court to the present United States District Court for the Southern District of Florida, under the same act, in order that the judgment of this court may be entered of record in that court, into which the proceedings and decree appealed from have been transferred under that act.

The record shows that the respondents made objection as to the jurisdiction in the court below; though, if omitted, the decree would not thereby have been legalized.

On the part of the appellee it was contended,—

1. That, upon principles of general law recognized by the common law, and from a civil necessity operating under all *239] *changes of sovereignty and jurisdiction, the tribunals established by Congress in the Territory of Florida continued in existence, and in the practical exercise of their functions, until superseded by other tribunals, called into actual existence and endued with the practical functions of judicature.

2. That this principal applies, *a fortiori*, to the Superior Courts established by Congress in the Territory for the exercise of those functions of judicature which the Constitution has appropriated exclusively to the judicial power of the

United States ; such as civil cases of admiralty and maritime jurisdiction, and seizures under the revenue laws, &c.

3. That there is nothing in either of the acts of Congress referred to inconsistent with the continued existence of the said Superior Courts in the active exercise of their functions, as instance courts of admiralty, until the District Court for the new District of Florida should be called into being and activity.

4. But, on the contrary, the identical act of Congress (22d Feb., 1847, ch. 17) which called this identical appeal into existence,—the authority asserted for this court, actually assumed by the court, and whereof the court is, at this moment, in the active use and exercise, to review, in the regular course of appellate jurisdiction, the decree of the said Superior Court for the Southern District of Florida,—does necessarily infer the existence of that court, and its continued possession of its judicial functions at the time of the rendition of the decree in question. The still subsisting relation between that court and this, of inferior court and appellate court, being recognized and admitted, to deny the existence of either court, or to assert the utter extinguishment of its judicial capacity, would be equally absurd, whether denied or asserted of the inferior or of the appellate court.

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from the District Court of the Southern District of the State of Florida.

Joseph Y. Porter, the appellee, filed a libel in admiralty, on the 24th of March, 1846, against the respondents, in the Superior Court for the Southern District of the Territory of Florida, for the proceeds of the sloop Texas, charging that he had furnished supplies and stores to the master, at the port of Key West, while she was engaged in the business of wrecking upon the Florida coast, and on the high seas.

The respondents, among other grounds of defence, denied the jurisdiction of the court. As the conclusion at which we *have arrived, upon this branch of the defence, dis- [*240
poses of the case, it will be unnecessary to set out the
pleadings at large, or to refer more particularly to the facts.

The Territorial government of Florida was established by the act of Congress of March 30th, 1822, amended by the act of March 3d, 1823, and the judicial power vested in two Superior Courts, and such inferior courts and justices of the peace as the Legislative Council of the Territory might from time to time establish. One of these courts was held in

West, and the other in East Florida. The judges were appointed by the President and Senate, for the term of four years, and possessed civil and criminal jurisdiction within their respective districts; and also the same jurisdiction in all cases arising under the laws and Constitution of the United States, which the acts of 24th September, 1789, and 7th March, 1793, vested in the court of the Kentucky District. 3 Stat at L., 654; Ibid., 750.

The number of judges was afterwards increased to five, and original and exclusive cognizance of all cases of admiralty jurisdiction within the Territory in terms conferred upon them. (Act of Cong., May 26, 1824, 4 Stat. at L., 45; Act of Cong., May 15, 1826, Id., 164; Act of Cong., May 23, 1828, Id., 291; Act of Cong., July 7, 1838, 5 Stat. at L., 294; Thompson's Dig., 585, App'x, where all the acts of Congress concerning the Territory of Florida are collected.)

Exclusive jurisdiction in these cases was specifically conferred by the act of May 15, 1826, probably on account of the case of *The American Insurance Co. and others v. Canter*, (1 Pet., 511,) in which it was held that the jurisdiction was not, as originally prescribed, exclusive, but might be vested by the Legislative Council of the Territory in subordinate courts. The case arose in 1825.

The court for the Southern District, in which the present case arose and was decided, was established by the act of Congress of May 23d, 1828, at Key West, and had conferred upon it all the jurisdiction within the district which belonged to the other Superior Courts of the Territory; besides a considerable enlargement of admiralty powers, which became necessary on account of the numerous wrecks usually happening upon that coast.

The objection to the jurisdiction taken by the respondents, however, is, not that the acts of Congress were insufficient to confer the power exercised by the courts, but that the acts had been abrogated and the jurisdiction superseded at the time of the rendition of the decree, by the admission of the Territory of Florida, as a State, into the Union, and were no longer in force. The admission was on the 3d of March, 1845.

*The suit was commenced on March 24th, 1846, *241] and the decree in favor of the libellant pronounced on May 22d of the same year. All the proceedings, therefore, took place before the court after the passage of the act of Congress admitting Florida into the Union; and must be upheld, if upheld at all, upon the ground that the jurisdiction still continued under the Territorial authority, notwithstanding the erection of the Territory into a State.

The people of the Territory, claiming a right to an admission into the Union under the pledge given by the sixth article of the treaty with Spain of the 22d February, 1819, met in convention and adopted their constitution, 11th January, 1839; but it was not acted upon by Congress till March 3, 1845. It was then accepted, and the Territory admitted, in the language of the act, "into the Union on an equal footing with the original States in all respects whatsoever." No conditions were annexed, except that she should not interfere with the disposal of the public lands, nor levy any tax on the same, while they remained the property of the United States.

Her constitution distributed the powers of the government into three separate and distinct departments, executive, legislative, and judicial, and prescribed the organic law of each. The judicial power was vested in a Supreme Court, Courts of Chancery, Circuit Courts, and justices of the peace, and the jurisdiction of each of them either defined, or provided for by imposing the duty upon the General Assembly. The State was to be divided into at least four convenient circuits, and until others were created by the proper authority, were to be arranged as the Western, Middle, Eastern, and Southern Circuits, for each of which a circuit judge was to be appointed. And, in order to avoid any inconvenience or delay in the organization of the government, an ordinance was adopted (art. 17 of the constitution), "that all laws, and parts of laws now (then) in force, or which may hereafter be passed by the Governor and Legislative Council of the Territory of Florida, not repugnant to the provisions of this constitution, shall continue in force until by operation of their provisions or limitation, the same shall cease to be in force, or until the General Assembly of this State shall alter or repeal the same"; and further, that "all officers, civil and military, now holding their offices and appointments in the Territory under the authority of the United States, or under the authority of the Territory, shall continue to hold and exercise their respective offices and appointments, until superseded under this constitution."

It will be seen, therefore, under this ordinance of the *convention, that, on the admission of Florida as a [*242 State into the Union, the organization of the government under the new constitution became complete; as every department became filled at once by the adoption of the Territorial laws and appointment of the Territorial functionaries for the time being.

The convention being the fountain of all political power, from which flowed that which was embodied in the organic

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law, were, of course, competent to prescribe the laws and appoint the officers under the constitution, by means whereof the government could be put into immediate operation, and thus avoid an interregnum that must have intervened, if left to an organization according to the provisions of that instrument. This was accomplished by a few lines, adopting the machinery of the Territorial government for the time being, and until superseded by the agency and authority of the constitution itself.

After the unconditional admission of the Territory into the Union as a State, on the 3d of March, 1845, with her constitution, and complete organization of the government under it, by which the authority of the State was established throughout her limits, it is difficult to see upon what ground it can be maintained that any portion of the Territorial government or jurisdiction remained still in force.

The distinction between the Federal and State jurisdictions, under the Constitution of the United States, has no foundation in these Territorial governments; and consequently, no such distinction exists, either in respect to the jurisdiction of their courts or the subjects submitted to their cognizance. They are legislative governments, and their courts legislative courts, Congress, in the exercise of its powers in the organization and government of the Territories, combining the powers of both the Federal and State authorities. There is but one system of government, or of laws operating within their limits, as neither is subject to the constitutional provisions in respect to State and Federal jurisdiction.

They are not organized under the Constitution, nor subject to its complex distribution of the powers of government, as the organic law; but are the creations, exclusively, of the legislative department, and subject to its supervision and control. Whether, or not, there are provisions in that instrument which extend to and act upon these Territorial governments, it is not now material to examine. We are speaking here of those provisions that refer particularly to the distinction between Federal and State jurisdiction.

We think it clear, therefore, that on the unconditional *243] admission of Florida into the Union as a State, on the 3d of March, 1845, the Territorial government was displaced, abrogated, every part of it; and that no power of jurisdiction existed within her limits, except that derived from the State authority, and that by force and operation of the Federal Constitution and laws of Congress; and, especially, no jurisdiction in Federal cases until Con-

gress interfered and extended the judicial tribunals of the Union over it.

The only pretext for a different conclusion is, that matters of exclusive Federal jurisdiction within the Territory, which, under our system, did not and could not pass under the State authority, still remained; and that with it, to that extent, and for the purposes of Federal jurisdiction, the Territorial organization continued. But, in the view we have already presented, and which need not be repeated, no such distinction existed in the Territorial government. Matters of this description had been blended together with those belonging to State jurisdiction, and were incorporated into, and became part and parcel of, the same system. The Federal causes of action were subject to the same tribunals as others, and to the same remedies, including writs of error, and appeals to the Appellate Court of the Territory, and through which, alone, cases could be brought up for revision to the Supreme Court of the United States. This Appellate Court consisted of the judges of the Superior Courts of the several judicial districts.

The position taken in support of the jurisdiction assumes that the admission of the State, and consequent transfer of all actions and causes of action belonging to the State authorities, had the effect, not only to separate the Federal from the State subjects of jurisdiction, but also to remodel the judicial system of the Territory itself, and adapt its jurisdiction to the trial of Federal causes,—assumptions that need only to be stated to carry with them their refutation. And, besides, were this admitted, and we could suppose that the jurisdiction of the courts was left untouched, as it respected the Federal cases pending or accruing, nothing would be gained in the argument in favor of its validity.

The admission of the State into the Union brought the Territory under the full and complete operation of the Federal Constitution, and the judicial power of the Union could be exercised only in conformity to the provisions of that instrument. By art. 3, § 1, "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may, from time to time, ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour."

*Congress must not only ordain and establish inferior courts within a State, and prescribe their jurisdiction, but the judges appointed to administer them must possess the constitutional tenure of office before they can become invested with any portion of the judicial power of the

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Union. There is no exception to this rule in the Constitution. The Territorial courts, therefore, were not courts in which the judicial power conferred by the Constitution on the Federal government could be deposited. They were incapable of receiving it, as the tenure of the incumbents was but for four years. (1 Pet., 546.) Neither were they organized by Congress under the Constitution, as they were invested with powers and jurisdiction which that body were incapable of conferring upon a court within the limits of a State.

Another answer, also, to the ground taken, is, that Congress on the same day on which the act passed admitting Florida as a State, organized the State into a judicial district, to be called the District of Florida, and ordained and established a District Court within the same, and conferred upon it the judicial powers belonging to the general government within the State. The act also provided for the appointment of a judge, together with other officers necessary to its complete and efficient organization. The laws of the United States, not locally inapplicable, were, also, extended over the State. Act of Congress, March 3, 1845 (5 Stat. at L., 788.)

It is true, the judge was not appointed to fill the office until the 8th of July, 1846, a year and five months afterwards; but the court was established, and invested with jurisdiction over the Federal cases. The powers remained in abeyance until the office was constitutionally filled. The vesting of the judicial power did not depend upon the appointment of the officer to administer it, as the grant in the constitution to Congress to ordain and establish inferior courts, and to invest them with the judicial power of the Union, is complete in itself; and they had acted and established the court, and invested it with the power, without condition or qualification.

Without, then, pursuing the examination further, we are satisfied that, in any aspect in which the question can be viewed, whether we look at the effect of the act of Congress admitting the Territory of Florida, as a State, into the Union, with her constitution and organized government under it, alone or in connection with the establishment of a Federal court within her limits, her admission immediately, and by constitutional necessity, displaced the Territorial government, and abrogated all its powers and jurisdiction.

*245] The State authority was *destructive of the Territorial; and, in connection with the establishment of the Federal jurisdiction, the organization of the government, State and Federal, under the Constitution of the Union, be-

came complete throughout her limits. No place was left unoccupied for the Territorial organization.

We have chosen to place the decision upon the effect of the admission of the State with a government already organized under her constitution, and prepared to go into immediate operation, because such is the case presented on the record; but we do not hereby intend to imply or admit that a different conclusion would have been reached if it had been otherwise, and the State had come into the Union with nothing but her organic law, leaving the organization of her government under it to a future period.

We conclude, therefore, that the court below possessed no jurisdiction of the case, and that the decree must be reversed.

Neither the act of Congress admitting the Territory of Florida, as a State, into the Union, nor the one organizing the District Court within it, made any provision for the transfer into the District Court of the cases of Federal jurisdiction pending at the time in the Territorial courts. Those cases were, therefore, left in the state in which they stood at the change of government, until the act of Congress of the 22d February, 1847 (Sess. Laws, ch. 17). That act provided for a transfer to the District Court, and also for a review of the judgments and final decrees on writs of error, or appeal, as the case might be, in the proper cases, to this court. It also provided for a review of the judgments or final decrees that had been rendered in Federal cases in the Territorial courts after the change of government, upon the idea that this jurisdiction still continued. And when the District Court for the Southern District of the State of Florida was established by an act of Congress, 23d February, 1847 (Sess. Laws, ch. 20), the like transfer was made to that court of all cases pending in that district, with like power to review, on writ of error or appeal, judgments and final decrees rendered by the Territorial courts after the change of government.

The case now before us was brought up for review by virtue of the authority of these acts, which have removed the objections that existed to our jurisdiction in the case of *Hunt v. Palao et al.*, 4 How., 589. Provision was made by the ordinance of the convention of Florida for the transfer of all actions at law, or suits in chancery, pending in the Territorial courts at the time of her admission, into such court of the State as had jurisdiction of the subject-matter. In pursuance of this *injunction, the General Assembly of the State [*246 passed an act, 22d July, 1845, transferring all cases to the proper courts of the State, except cases cognizable by the

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Federal courts. Acts of General Assembly, 1 Sess., p. 9, §§ 5, 8, and p. 13, §§ 13, 14.)

The case of *Hunt v. Palao et al.*, already referred to, was one that had been transferred by this act of the General Assembly, from the Territorial court in which the judgment had been rendered, to the Supreme Court of the State; and we held, on an application for a writ of error, to review the judgment, that we possessed no power over it without further legislation by Congress, for the reason that the Territorial court in which the judgment was rendered no longer existed; and that the State court to which it had been transferred could exercise no judicial power over it, as the law of the State directing the transfer of the record could not make it a record of the court, nor authorize any proceedings upon it.

The subsequent legislation of Congress respecting the transfer of these records to the District Courts, to which we have referred, grew out of this decision. That was a case of Federal jurisdiction, which the State government, confessedly, had no power over; but the language of the court was general, and applicable to all cases pending in the Territorial courts at the change of government.

We perceive no ground for qualifying the opinion expressed on that occasion, believing it sound and incontrovertible; but it may be proper to state with a little more fulness the effect of it, as it respects cases of State jurisdiction. The Territorial courts were the courts of the general government, and the records in the custody of their clerks the records of that government; and it would seem to follow, necessarily, from these premises, that no one could, legally, take the possession or custody of the same without the assent, express or implied, of Congress. Such assent is essential, upon the plainest principles, to an authorized change of their custody.

On the admission of a Territorial government into the Union as a State, the concurrence of both the Federal and State governments would seem to be required in the transfer of the records, in cases of appropriate State jurisdiction, from the old to the new government. An act of Congress would be incapable of passing them under the State jurisdiction, as would be an act of the Legislature of the State to take the records out of the custody of the Federal government. Both should concur.

The like concurrent legislation would also seem to be required in respect to cases pending in this court for review on writs of error or appeal from the Territorial courts, which
*247] *appropriately belonged to State jurisdiction, to enable
us to send down the mandate to the proper State tri-

bunal for any further proceedings that might be necessary in the cause. Otherwise, Congress itself should specially provide for the execution of the mandate.

We have said that the assent of Congress was essential to the authorized transfer of the records of the Territorial courts, in suits pending at the time of the change of government, to the custody of State tribunals. It is proper to add, to avoid misconstruction, that we do not mean thereby to imply or express any opinion on the question, whether or not, without such assent, the State judicatures would acquire jurisdiction. That is altogether a different question. And, besides, the acts of Congress that have been passed, in several instances, on the admission of a State, providing for the transfers of the Federal causes to the District Court, as in the case of the admission of Florida, already referred to, and saying nothing at the time in respect to those belonging to state authority, may very well imply an assent to the transfer of them by the State to the appropriate tribunal. Even the omission on the part of Congress to interfere at all in the matter may be subject to a like implication. And a subsequent assent would, doubtless, operate upon past acts of transfer by the State authority.

It is to be regretted that proper provision has not always been made by Congress, upon a change of government, in respect to the pending business in the Territorial tribunals, so as to remove all embarrassment and perplexity on the subject.

From the examination we have given to the legislation upon the admission of several of the new States into the Union, we have found but few instances of any provision having been made in respect to the cases pending in the old government; and those are limited to the transfer of the Federal cases to the District Court organized in the new State. In some of the constitutions of the States, provision had been made for the pending business of appropriate State jurisdiction; but not in all of them. A very slight attention to the subject by Congress, at the time, would remove all the difficulties that have occurred in several of the States recently admitted.

Upon the whole, we are satisfied that the Territorial government of Florida became superseded on the unconditional admission of the Territory into the Union as a State, on the 3d of March, 1845, and consequently, that the court below, whose authority depended upon that government, had no jurisdiction to render the decree in the case, and that the decree must be reversed.

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*248] *A doubt was suggested, on the argument, as to the proper disposition of the case in the event of our arriving at the conclusion, that the jurisdiction of the court below ceased at the termination of the Territorial government. But the acts of Congress of February 22 and 23, 1847 (Sess. Laws, ch. 17, § 8, and ch. 20, § 7), which provided, specially, for a review of this class of cases in this court, have also provided for the execution of any judgment that may be given in them, by directing that the mandate shall be issued to the District Court of the State into which the same acts had already transferred the records.

The case, therefore, can take the usual direction in cases where this court determines that the court below acted without jurisdiction in the matters before it; and that is, to reverse the decree and remit the case, with directions that the court dismiss the proceedings, which direction is given accordingly.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Florida, and was argued by counsel. On consideration whereof, it is now here ordered and decreed by this court, that the decree of the said District Court in this cause be, and the same is hereby, reversed and annulled, for the want of jurisdiction in that court, and that this cause be, and the same is hereby, remanded to the said District Court, with directions to dismiss the libel in this cause.

ANNA M. MASON, WIDOW, AND JOHN MASON, JAMES M. MASON, EILBRECK MASON, MURRAY MASON, MAYNADIER MASON, BARLOW MASON, SAMUEL COOPER AND SARAH M., HIS WIFE, SIDNEY S. LEE AND ———, HIS WIFE, CECILIUS C. JAMESON AND CATHERINE, HIS WIFE, HEIRS AND DEVISEES OF JOHN MASON, DECEASED, PLAINTIFFS IN ERROR, v. JOSEPH N. FEARSON.

Under the earlier charters of the city of Washington, this court decided (8 Wheat., 687), that, where an individual owned several lots which were put up for sale for taxes, the corporation had no right to sell more than one, provided that one sold for enough to pay the taxes on all.

In 1824, Congress passed an act, providing, "That it shall be lawful for the said corporation, when there shall be a number of lots assessed to the same person or persons, to sell one or more of such lots for the taxes and ex-

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penses due on the whole; and also to provide for the sale of any part of a lot for the taxes and expenses due on said lot, or other lots assessed to the same person, as may appear expedient, according to such rules and regulations as the corporation may describe.

*This is not in conflict with the previous decisions of this court. The discretion given to the corporation is not unlimited to sell each lot [*249 for its own taxes. On the contrary, the words "it shall be lawful" and "may" sell one lot, impose an obligation to stop selling if that one lot produces enough to pay the taxes on all.¹

What a public corporation or officer is empowered to do for others, and it is beneficial to them to have done, the law holds he ought to do.

THIS was an action of ejectment brought by John Mason, in his lifetime, to recover possession of some lots in the city of Washington held under a tax title.

The case was brought up, by writ of error, from the Circuit Court of the United States for the County of Washington and District of Columbia.

In the trial of the cause in the Circuit Court, the following statement of facts was agreed upon, subject to the opinion of the court upon it.

Statement.

"The plaintiff, to support the issue on his part, made out a title in one Benjamin Stoddert, in all the lots in the declaration mentioned, except lot No. 8, in square No. 44, under the Commissioners of the City of Washington, or the Superintendent of the Public Buildings in said city, and proved that lot No. 8, in square No. 44, was allotted to Robert Morris and John Nicholson, original proprietors of the ground on which the said square was laid out, in the distribution of the lots in said square between the public and the proprietors, and then made out a title in the said Benjamin Stoddert, under the said Morris and Nicholson, to the said lot No. 8, in square No. 44. It was thereupon agreed that Benjamin Stoddert was, prior to the 18th day of April, in the year 1805, seized in fee of all the lots in the said declaration mentioned. The plaintiff, further to support the issue on his part, offered to read, and read in evidence to the jury, a deed of conveyance of each of the said lots from the said Benjamin Stoddert, bearing date the 18th day of April, in the year 1805, to David Peter and James S. Morsell, and to the survivor of them, and the heirs of such survivor, in the words and figures following, to wit (copied in

¹ DISTINGUISHED. *Thompson v. Lessee of Carroll*, 22 How., 434; *Supervisors v. United States*, 4 Wall., 446.

As to when the word "may" in a statute will be construed to mean "must" or "shall," see also 5 Wall.,

705; 28 Ala., 28; 45 Cal., 696; 44 Conn., 534; 68 Ill., 144; 70 Id., 587; 110 Mass., 238, 239; 125 Id., 198, 201; 48 Mo., 167; 11 Nev., 260; 51 N. Y., 401, 406; 72 Id., 583, 586.

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p. 20); also the printed articles of association mentioned and referred to in the said deed (copied in p. 49). The plaintiff also offered to read, and read in evidence to the jury, the bill of complaint, answers, and decree, in a certain cause on the chancery side of the said Circuit Court for the county aforesaid, in which Henry Alexander and Mary Air were complainants, and James S. Morsell, and Joseph Forrest, and others, were defendants; also the report of the proceedings of James S. Morsell, the trustee appointed by the decree of *250] said court, in the said cause, and of the *sales made by him in virtue of such decree, and the orders of the said court ratifying the said sales, and a deed from the said trustee to the plaintiff's lessor, the said John Mason, for the said lots in the said declaration mentioned, bearing date the 13th day of November, in the year 1844 (copied in pp. 32 to 57). The plaintiff also read in evidence to the jury two receipts signed W. W. Billing, collector, marked B and C, one for taxes for the years 1826 and 1827, the other for taxes for the year 1832, on sundry lots therein mentioned, assessed to the Washington Tontine Company (copied in pp. 61, 62). The plaintiff there rested.

"Whereupon the defendant, to support the issue on his part, produced, and read in evidence to the jury, the official assessment-books of the corporation of the city of Washington, for the years 1836 and 1837, and proved that the lots in the said declaration mentioned, with divers other lots in the said city, amounting to twenty in number, were assessed for the said years to the Washington Tontine Company; 'that the said lots, and many others in the said city, had been so assessed in the books of the said corporation to the Washington Tontine Company,' from the years 1808 down to 1840 inclusive. The defendants also produced and read in evidence the tax-books of the said corporation for the years 1836 and 1837, and proved thereby that the lots in the said declaration mentioned, and sundry other lots assessed to the Washington Tontine Company, appeared arranged in columns in the established and accustomed forms, exhibiting the manner in which said lots were assessed for those years, the numbers of the lots and squares, the rate of assessment, valuation of the lots severally, the valuation of the improvements, and the amount of tax on each lot; that the lots so assessed to the Washington Tontine Company were entered in the said tax-books for the years 1836 and 1837, in the following manner (copied in pp. 63).

"The defendant further proved, that the tax on the said lots, so assessed to the Washington Tontine Company, for the

year 1836, fell due and was payable on the 1st day of January, in the year 1837, and the tax on the same lot for the year 1837 fell due and was payable on the 1st day of January, 1838; and that on the 1st day of January, in the year 1838, there were two years' taxes due and in arrear on the said lots in the said declaration mentioned, and on the others so assessed to the said Washington Tontine Company. It is further proved, on the part of the defendant, that the collector of taxes imposed by the said corporation, and who was authorized to advertise and sell the property liable to be sold in the said city for taxes, on *the 15th day of September, in the year 1838, the taxes on the said lots for the year 1836 and 1837 being in arrear and unpaid, caused to be inserted in the National Intelligencer, a newspaper published in the said city, the following advertisement (copied in p. 64); and that the said advertisement appeared in the said newspaper once in each week for twelve successive weeks before the day appointed therein for the sale of the said lots; that the said advertisement was erroneous, in that it stated that three years' taxes were in arrear and unpaid on the said lots, the fact being that the tax on the said lots for the year 1835 had been paid to the corporation before the said advertisement appeared; that such error was detected before the sale, and the lots were in fact sold for the taxes due and in arrear for the years 1836 and 1837; that in pursuance of his authority, and according to the tenor of the said advertisement, the said collector, on the 8th day of December, in the year 1838, set up at public sale, in the Aldermen's room, in the City Hall, in said city, in the presence of about sixty persons, the said lots so advertised and assessed to the Washington Tontine Company; and the said lots, being all the lots so assessed to said Washington Tontine Company, were severally sold, each for its own tax, and the said sales were reported, and entered on the official sales book of the said corporation, in manner and form following, (copied in p. 65,) which shows the number of the lots and squares, to whom the same were assessed, the names of the purchasers, the amount of tax due on each lot, the expenses of sale, and the amount for which each lot sold; it was also proved by the said collector, and is admitted, that the said lots were sold in the order in which they appear set down in the said advertisement and report of sales.

"It was further proved by the defendant, that the said defendant paid the taxes and expenses on each lot purchased by him at said sale; and that on the 19th day of May, in the year 1841, the said defendant paid the residue of the purchase-money for the said lots bought by him, with interest thereon,

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at the rate of 10 per cent. from the 8th day of December, in the year 1840, to the said 19th day of May, 1841, and no more, and received a deed for the said lots from the mayor of the said city of Washington on the 1st day of June, in the same year, duly executed and acknowledged, and afterwards recorded, which was given in evidence to the jury, and in the words and figures following, to wit (copied in p. 66). It was further admitted, that the said John Mason, the plaintiff lessor, was one of the original subscribers and members of the said Washington Tontine Company, from the commencement *252] of its *organization to its dissolution, and received his share of the assets thereof; and that certificates of stock in said company were issued by said company to the original shareholders, in the words and figures following, to wit (copied in p. 70). And that the said John Mason, the plaintiff lessor, held such certificate for the shares of stock in the said company owned by him.

"Whereupon, the said facts having been so proved and agreed, and reduced to writing, it was agreed by the counsel for the plaintiff and the defendant, that a verdict should be entered for the defendant, subject to the opinion of the court on the facts and evidence so proved, agreed, and stated, as well on the part of the plaintiff as of the defendant; and that if the court should be of opinion, from the facts and evidence so proved, agreed, and stated, on both sides, that the sale of the lots mentioned in the declaration so made as aforesaid, by the authority of the corporation of Washington city, was a legal and valid sale, and that the defendant thereby acquired a legal title to the said lots, the said verdict should be entered for the defendant; but if the court should be of opinion that the said sale was not a legal and valid sale, and that the legal title to the said lots did not thereby pass to the defendant, that the verdict shall be entered, and judgment thereon be recorded for the plaintiff. Either party to have a right of appeal to the Supreme Court of the United States upon the above statement of facts and evidence, so proved and agreed, and the judgment of the court thereon.

"JOHN MARBURY, *Plaintiff's Attorney.*

W. REDIN, *Defendant's Attorney.*"

The assessed value of the lots and report of sales, referred to in the above statement, were as follows:—

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Assessed Value of the Lots.

| Owner's Name and Residence. | No. of Square. | No. of Lot. | Value of Lot. | Owner's Name and Residence. | No. of Square. | No. of Lot. | Value of Lot. |
|-----------------------------|----------------|-------------|---------------|-----------------------------|----------------|-------------|---------------|
| Washington Tontine Co. | 5 | 4 | \$82 | Washington Tontine Co. | 31 | 2 | \$198 |
| " " | — | 24 | 296 | " " | — | 10 | 96 |
| " " | — | 26 | 109 | " " | — | 14 | 128 |
| " " | 6 | 7 | 163 | " " | — | 15 | 101 |
| " " | — | 8 | 90 | " " | 37 | 6 | 90 |
| " " | 17 | 13 | 96 | " " | 42 | 1 | 137 |
| " " | — | 14 | 81 | " " | 44 | 8 | 109 |
| " " | 28 | 5 | 111 | " " | 55 | 1 | 123 |
| " " | — | 6 | 83 | " " | — | 2 | 169 |
| " " | — | 28 | 311 | " " | — | 15 | 230 |

**Extract from the Report made by the Collector to the Register, of Lots sold for Taxes, on the 8th day of December, 1838.* [*253]

| No. of Square. | No. of Lot. | To whom assessed. | Amount of Tax on each Lot. | Expense on each Lot. | To whom sold. | Amount sold for. | Amount received. |
|----------------|-------------|------------------------|----------------------------|----------------------|-----------------|------------------|------------------|
| 5 | 4 | Washington Tontine Co. | \$1.22 | \$0.94 | Anthony Preston | \$35 | \$2.16 |
| — | 24 | " " | 4.44 | 1.06 | " " | 50 | 5.50 |
| — | 26 | " " | 1.64 | 0.95 | T. W. Pairo | 35 | 2.59 |
| 6 | 7 | " " | 2.46 | 0.99 | Wm. Eashby | 40 | 3.45 |
| — | 8 | " " | 1.34 | 1.14 | " " | 30 | 2.48 |
| 17 | 13 | " " | 1.44 | 0.95 | Anthony Preston | 66 | 2.39 |
| — | 14 | " " | 1.22 | 0.94 | G. C. Grammer | 35 | 2.16 |
| 28 | 5 | " " | 1.68 | 0.95 | J. N. Fearson | 52 | 2.63 |
| — | 6 | " " | 1.24 | 0.93 | " " | 40 | 2.17 |
| — | 28 | " " | 4.68 | 1.07 | " " | 45 | 5.75 |
| 31 | 2 | " " | 2.96 | 1.01 | " " | 40 | 3.97 |
| — | 10 | " " | 1.44 | 0.95 | " " | 10 | 2.39 |
| — | 14 | " " | 1.92 | 0.97 | " " | 25 | 2.89 |
| — | 15 | " " | 1.52 | 0.95 | " " | 31 | 2.47 |
| 37 | 6 | " " | 1.34 | 1.14 | " " | 10 | 2.48 |
| 42 | 1 | " " | 2.04 | 0.97 | " " | 41 | 3.01 |
| 44 | 8 | " " | 1.64 | 0.95 | " " | 20 | 2.59 |
| 55 | 1 | " " | 1.84 | 0.97 | G. C. Grammer | 31 | 2.81 |
| — | 2 | " " | 2.56 | 0.99 | J. N. Fearson | 22 | 3.55 |
| — | 15 | " " | 3.46 | 1.03 | A. Preston. | 47 | 4.49 |

Upon the agreed state of facts, the Circuit Court gave judgment for the defendant. The plaintiff brought the case to this court, by writ of error, and the present plaintiffs in error were his heirs and devisees.

It was argued by *Mr. James M. Mason*, for the plaintiffs in error, and *Mr. Bradley*, for the defendant in error.

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On the part of the plaintiffs in error, three points were raised, of which it is necessary to notice only one.

1. That, pursuant to the charter of their authority, it was the duty of the corporate authorities of this city, in selling for taxes in arrears the several lots in the proceedings mentioned, all of which, though belonging to the appellant, were assessed to the Washington Tontine Company, to sell only "so much thereof as might be necessary" to pay the taxes due, with all legal costs and charges arising thereon; that is to say, to sell "one or more of said lots," so assessed, as might be found necessary to discharge the same.

Whereas, as appears by the case stated, these lots were "severally sold each for its own tax," without regard to the fact that the first two lots sold did sell for more than sufficient to *pay all taxes and charges due on the whole *254] number advertised, as assessed to the Washington Tontine Company. Upon this point we refer to the act aforesaid of 1820, § 10; Act of 1824, § 4; Act of 1848, § 7; *Corporation of Washington v. Pratt*, 8 Wheat., 681; *Ronken-dorf v. Taylor's Lessee*, 4 Pet., 349; *Stead's Executors v. Course*, 4 Cranch, 403; *Williams et al. v. Peyton's Lessee*, 4 Wheat., 77; s. c., 4 Cond. Rep., 349; *Thatcher et al. v. Powell*, 6 Wheat., 119.

Mr. Bradley, for the appellant, maintained the following propositions:—

First. The power of taxation, and the mode in which it is to be exercised, are given alone by the act of May, 1820.

And in point of fact all the requirements of that act in that particular have been complied with, and the books of the corporation are evidence of these acts.

Second. The means of enforcing this power, as against the lot itself, are given in the second section of the act of 1824.

And in point of fact all the acts necessary under that section to be done have been fully performed by them in this case, unless they are restricted by the fourth section of the same act.

Third. That the fourth section of the act of 1824 is not mandatory; and it is left to the discretion of the corporate authorities whether they will or will not provide for the sale of any one or more lots, or part or parts of lots, to satisfy the taxes due on the whole, assessed to the same person.

No objection having been taken below, and none appearing on the record as to the first two propositions, the argument will be principally directed to the third, on which, indeed,

the case turns. If it shall be established, this case will operate to confirm the titles to a vast amount of property in this city which has been sold for taxes since 1824; and if a different construction is given to it, those titles will, to that extent, be disturbed.

1st. If we collect from the original act and this supplement alone, or from the case of the *Corporation of Washington v. Pratt, Francis, and others*, the defects which existed in the charter, and which were designed to be remedied by this supplement, we will find it must be construed as discretionary and not mandatory. The following rules of interpretation are given by the Barons of the Exchequer in *Heydon's case*, 3 Co., 7:—Inquire

1. What was the common law before making the act.

2. What was the mischief and defect against which the common law did not provide.

*3. What remedy Parliament hath resolved and appointed to cure the disease of the commonwealth, &c. [*255

4. The true reason of the remedy.

And it was held to be the duty of the judges, at all times, to make such construction as would suppress the mischief and advance the remedy, putting down all subtile inventions for the continuance of the mischief, *et pro privato commodo*; and adding force and life to the cure and remedy, according to the true intent of the makers *et pro bono publico*.

And Dwarrris, p. 697, says,—“The cause and reason of the act (or, in other words, the mischief requiring the remedy) may either be collected from the statute itself, or discovered from circumstances extrinsic of the act. . . . The remedy is to be gathered from the act itself.”

2d. If we take the whole act, and compare its different provisions to reconcile them, this section must be construed as granting a power to be exercised at the discretion of the corporation. *Howell v. Lord Zouch*, Plowd., 365; *Doe d. Bywater v. Brandling*, 7 Barn. & C., 643; Co. Lit., 381, a; Opinion of Coleridge, J., in *Rex v. Poor Law Com.*, 6 Ad. & El., 7; Broom, Leg. Max., 253, 254; 1 Kent, Com., 462; *Pennington v. Cox*, 2 Cranch, 33; *U. States v. Fisher*, Id., 358.

3d. If the words are not precise and clear, and such construction is given as will alone secure it from an absurd consequence, it must be taken as permissive, not mandatory. *Commonwealth v. Kimball*, 24 Pick. (Mass.), 37; *United States v. Fisher*, 2 Cranch, 358.

4th. In order that one clause shall not frustrate and destroy the others, but explain and support them, this section

must be construed as permissive. Best, J., 4 Bing., 196; Dwarris, 703, 704.

5th. The words of the act are plain and unambiguous. It is "to be read without breaks or stops"; there are qualifying words at the end of the section; they must operate on all the precedent grants in the section. 2 Inst., 50; Dwarris, 704; 1 Stev. Elec. L., 21.

6th. It may be generally true, that, where a public body or officer has been clothed by statute with power to do an act which concerns the public interest, or the right of third persons, the execution of the power may be insisted on as a duty, though the phraseology of the statute be permissive merely and not peremptory. *City of New York v. Furze*, 3 Hill (N. Y.), 612. Yet if the exercise of that power is clearly intended by the legislature to be discretionary in the public body or officer to whom it is intrusted, the rule cannot apply. For no general rule can be laid down upon this subject, further than that that exposition ought to be adopted in this, as in other cases, which carries into effect the true intent and object of the legislature in the enactments. Story, J., in *Minor et al. v. The Mechanics' Bank of Alexandria*, 1 Pet., 64.

In this case the intention is clear from "the cause, the reason, and remedy," from "the whole act itself," from "a comparison of the different sections and provisions," from "the very words of the act," and because "any other construction would involve absurd consequences," and that intention was, not to give a power which the corporation *must*, but which it *might*, exercise.

Mr. Justice WOODBURY delivered the opinion of the court.

Several reasons have been assigned for the reversal of the judgment in this case; but as we think one of them is well founded, it is not necessary to examine the others. That one is the sale of each of the twenty lots, assessed to the Washington Tontine Company, instead of selling the first two lots only, they having been bid off for more than enough to pay the taxes on the whole. The sale of all of them was, therefore, unnecessary to insure the collection of all the taxes; and as they brought but little beyond one fourth of their appraised value, the sale of all was not only unnecessary, but a great sacrifice of property.

It is admitted by the city, which defends this action, that the law authorized the sale of so many lots assessed to the same proprietor as would be sufficient to pay the taxes on

all, and there to stop. But at the same time, it is contended that the law allowed a discretion to the city to sell each lot for the tax on each, and that in the exercise of this discretion the sale of all can be vindicated as legal.

We think otherwise. After careful examination, we are satisfied that no such discretion was meant to be conferred, under the circumstances of the present case. Though the ancestor of the plaintiffs in error became entitled to eleven of the twenty lots sold as early as 1827, and paid the taxes on them for two or three years, yet he never caused his name to be entered in the city books as proprietor of them, nor obtained any deed of them executed and recorded, so that the city might see the change of title to him on the records, and tax them to him, till November 13th, 1844. Hence, in 1836-37, when the taxes now in controversy were assessed, the city rightfully taxed all these lots to the Tontine Company, and could sell any of them to pay the taxes imposed on all, against that company.

*The ancestor of the plaintiffs could not complain [*257 of that course, under his own neglect to perfect his title, so as to have his name, rather than the name of the company, entered on the tax-list as owner of eleven of the lots. Much less does it comport with reason that the city should on this ground object to its own power to sell any of those lots to pay the taxes assessed on all, when its officers have claimed them all to belong to the company, and had assessed and sold them all as the property of the company.

But, independent of this, a discretion to sell all is claimed under the act of Congress of 1824. In order to judge correctly whether there is a good foundation for this discretion, it will be necessary to examine briefly the history of the legal provisions on this point, and the provisions themselves.

Under the city charter, as amended May 4th, 1812 (2 Stat. at L., p. 721, § 8), "unimproved lots," "or so much thereof as may be necessary to pay such taxes, may be sold," for their payment.

On the 15th of May, 1820, a new charter was given to the city, which provided that "real property, whether improved or unimproved," "or so much thereof, not less than a lot, (when the property upon which the tax has accrued is not less than that quantity,) as may be necessary to pay any such taxes," "may be sold," &c. 3 Stat at L., p. 589, § 10.

In 1823, a decision was made by this court, in the case of the *Corporation of Washington v. Pratt*, 8 Wheat., 687, settling the construction of the laws as existing in 1812 on several points in relation to the assessment and sale of lots

for taxes; and, among other things, holding on this particular point as follows:—"But if taxes be due by one and the same individual in small sums upon many lots, and one lot, being set up for sale, produces a sum adequate to the payment of all, the whole arrears become paid off, and no excuse can then exist for making further sales." The act of May 26th, 1824, was then passed, which in some respects provided anew concerning a part of the points settled in 1823, where the act or charter of 1820 was similar to that of 1812.

But on the point now under consideration it made a special provision in these words:—"And be it further enacted, that it shall be lawful for the said corporation, where there shall be a number of lots assessed to the same person or persons, to sell one or more of such lots for the taxes and expenses due on the whole; and also to provide for the sale of any part of a lot for the taxes and expenses due on said lot, or other lots assessed to the same person, as may appear expedient, according to such *rules and regulations as the said corporation may prescribe." (See act of May 26th, 1824, § 4.)

The city contends, that this changed the construction given to the law of 1812 by this court in 1823, or rather changed the law of 1820, which was the same in substance as that of 1812, and conferred a discretion to sell each lot for its own tax, or only so many of several assessed to the same person as might be necessary to pay all the taxes due from him.

But it will be seen that the language used in the last act, of 1824, was substantially the same on this subject as that in 1812 and 1820. The words used in the former acts, as to a sale of all or a portion of the lots for the taxes on all, had been recently adjudged by this court to require absolutely that the latter course be pursued when a part sold for enough. And Congress, so far from appearing to wish an alteration of the law in this particular, as just construed, seem to sanction it by declaring explicitly, as before, the existence of the power to sell a part of the lots, and which power this court had, under all the circumstances, decided was imperative on the city. The chief difference in this respect between the acts of 1812, 1820, and 1824 was, that, in the last, Congress used more clear and positive terms than before, when authorizing the sale of a part of the lots for all the taxes, and added a material change, authorizing them to sell, when "appearing expedient," even a part of one lot. Evidently, by the sense and the locality in the sentence of the expression "as may appear expedient," they confined any new discretion or expe-

diency thus conferred to the new provision for the sale of a part of a lot.

Was there any reason existing why we should infer that Congress meant to make any other change than this last in respect to such sales?

The former provisions for selling only one or more lots, when enough to pay the taxes on all belonging to the same owner had existed so long, had been so positively adjudged by this court to be imperative, and were so obviously just and necessary to prevent sacrifices and speculation, that Congress in 1824 might well entertain no disposition to alter them, but rather to adopt and confirm the construction given by this court in the previous year.

With the knowledge of our construction, like words being again repeated by Congress, it may well be considered that a like construction was intended, and was expected to be given to those words. The only plausible argument which remains to be considered against the design to make this power to sell only enough to pay all the taxes mandatory, as it had before *been construed by this court, rests on the supposed [*259 incorrectness of the general rule of construction, as applied to the facts here, which holds the expression "may" sell, or "it is lawful" to sell, in a particular way, to be imperative. But if we look to the true test of the principle involved in the question, no great doubt can remain. This general rule may seldom be correct, in a popular sense, as to such words when used in contracts and private affairs. But under the circumstances existing here, it is founded on sound principles and numerous precedents.

The form of expression adopted here, it must be remembered, is employed in laws, and not contracts, and of course, if a well established construction had been before given to it in laws by the courts under certain circumstances, it must be presumed to have been well known, and intended here under like circumstances. What are these circumstances? Whenever it is provided that a corporation or officer "may" act in a certain way, or it "shall be lawful" for them to act in a certain way, it may be insisted on as a duty for them to act so, if the matter, as here, is devolved on a public officer, and relates to the public or third persons.

Thus, in *Rex & Regina v. Barlow*, 2 Salk., 609,—“Where a statute directs the doing of a thing for the sake of justice or the public good, the word ‘may’ is the same as the word ‘shall’; thus, 23 Hen. 6 says the sheriff *may* take bail; this is construed he *shall*, for he is compellable so to do.” *Cartthew*, 293.

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On this, see further, *The King v. The Inhabitants of Derby*, Skinn., 370; *Backwell's case*, 1 Vern., 152-154; 2 Chit., 251; Dwarr. Stat., 712; *Newburgh T. Co. v. Miller*, 5 Johns. (N. Y.) Ch., 113; *City of New York v. Furze*, 3 Hill (N. Y.), 612, 614; *Minor et al. v. The Mechanics' Bank*, 1 Pet., 64. Without going into more details, these cases fully sustain the doctrine, that what a public corporation or officer is empowered to do for others, and it is beneficial to them to have done, the law holds he ought to do. The power is conferred for their benefit, not his; and the intent of the legislature, which is the test in these cases, seems under such circumstances to have been "to impose a positive and absolute duty." But, under other circumstances, where the act to be done affects no third persons, and is not clearly beneficial to them or the public, the words "may" do an act, or it is "lawful" to do it, do not mean "must," but rather indicate an intent in the legislature to confer a discretionary power. *Malcom v. Rogers*, 5 Cow. (N. Y.), 88; 1 Pet., 64; 5 Johns. (N. Y.) Ch., 113.

*260] *So, in private contracts or trusts, such language may confer a discretion. 5 Johns. (N. Y.) Ch., 113. But in the case of a law and of public officers, and as to acts affecting third persons, as here, that the authority thus conferred must be construed to be peremptory is not only manifest from the above precedents and their analogies, but has been virtually settled by this court in the 8th of Wheaton, before cited, on the act of 1812, which, we have already seen, used language the same in substance as that of 1824 on this particular point.

The argument that the owner of these lots need not have suffered by all of them being sold, and at a low price, because he might have redeemed them, has little force when the same oversight, or accident, or misfortune, which prevented the seasonable payment of the tax, is likely to prevent the redemption, and when this argument, if sound, would apply to any other defect in the sale, and operate against the force of it, on the ground that the owner might redeem.

But instead of such loose constructive leniency towards a purchaser under a special law, it is well settled that where a tax title is to be made out by a party under such a law, as by the defendant in this case, it must be done in all material particulars fully and clearly. *Stead's Executors v. Course*, 4 Cranch, 403; *Waldron v. Tuttle*, 3 N. H., 340. In the language of some of the cases, it must be done "strictly," "exactly," "with great strictness." 6 Wheat., 127; 8 Id., 683; 4 Pet., 359.

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The purchaser, setting up a new title in hostility to the former owner, is not to be favored, and should have looked into it with care before buying, and not expect to disturb or defeat old rights of freehold without showing a rigid compliance with all the material requisitions of the laws under which the sale was made. Finally, it tends to fortify the view here adopted, that the statutes in several States on the subject of such sales allow only so many lots to be sold as will pay all the taxes against the same owner, such course being manifestly the most just. 4 Cranch, 403; 4 Wheat., 81, n.

Judgment below reversed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, *reversed, with costs, and that [*261 this cause be, and the same is hereby, remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

JACOB STRADER, ROBERT BUCHANAN, JOHN MCCORMICK, JOHN R. CORAM, JOSEPH SMITH, JAMES JOHNSON, AND GEORGE C. MILLER, TRUSTEES OF THE COMMERCIAL BANK OF CINCINNATI, v. HENRY BALDWIN.

Where the defendant pleaded his discharge under the Bankrupt Act of 1841 passed by Congress, and the plea was allowed, the plaintiff cannot bring the case to this court to be reviewed, under the twenty-fifth section of the Judiciary Act.

The defendant pleaded a privilege or exemption under a statute of the United States, and the decision was in favor of it.

The case, must, therefore, be dismissed, for want of jurisdiction.¹

THIS case was brought up, from the Supreme Court of the State of Ohio, within and for the County of Hamilton, by a writ of error issued under the twenty-fifth section of the Judiciary Act.

¹ APPLIED. *Calcutt v. Stanton*, 18 How., 244; *Roosevelt v. Meyer*, 1 Wall., 51' VOL. IX.—18 273

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The case arose in this way.

Baldwin was a clerk in the Commercial Bank of Cincinnati. In 1844, the trustees of the bank brought an action of assumpsit against him for \$10,000. Baldwin pleaded, amongst other matters, that he had received a discharge under the bankrupt law passed by Congress. The plaintiffs filed a replication, that the debt was contracted whilst Baldwin was acting in a fiduciary capacity, and therefore not discharged from the debt. The defendant demurred to this replication, which demurrer was sustained by the Superior Court, and also by the Supreme Court of Ohio on error.

The plaintiffs then brought the case to this court, under the twenty-fifth section of the Judiciary Act.

It was argued by *Mr. Walker*, for the plaintiffs in error, and *Mr. Lincoln*, for the defendant in error.

The question of jurisdiction was not argued by either counsel.

Mr. Justice GRIER delivered the opinion of the court.

This case is brought here by a writ of error to the Supreme Court of Ohio.

As the power of this court to review the decisions of State tribunals is limited to certain specified cases and conditions, *262] the *first inquiry which necessarily presents itself, is whether we have jurisdiction.

The plaintiffs in error instituted this suit in the Superior Court of Cincinnati. The declaration has the common counts in assumpsit. The defendant appeared and pleaded his discharge under the act of Congress of the 19th of August, 1841, to "establish a uniform system of bankruptcy, &c." The plaintiffs denied the validity of this discharge, on the ground that the debt was incurred by defendant while acting as clerk or book-keeper in the Commercial Bank, and therefore "acting in a fiduciary capacity."

The Supreme Court of Ohio gave judgment for the defendant, and the plaintiffs prosecuted their writ of error to this court.

The twenty-fifth section of the Judiciary Act, which is the only source of our authority in cases like the present, gives this court jurisdiction to "reëxamine" the judgment of a State court only where the decision "is against the title, right, privilege, or exemption specially set up or claimed" under an act of Congress.

The plaintiffs in this case have set up no act of Congress in their pleadings, under which they support their claim or

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title to recover. It is the defendant who has pleaded a privilege or exemption under a statute of the United States, and relies upon it as his only defence. If the decision of the State court had been against him, his right to have his case reëxamined by this court could not be doubted. But the decision has been in favor of the right set up under the statute, the validity of which was denied by the plaintiffs. We have no jurisdiction to entertain a writ of error to the Supreme Court of Ohio at their suggestion.

This case must, therefore, be dismissed, for want of jurisdiction.

ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Ohio, within and for the County of Hamilton, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that this cause be, and the same is hereby, dismissed, for the want of jurisdiction.

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Where promissory notes were executed in Louisiana, but made payable in Mississippi, and indorsed in Mississippi, and the indorsee sues in Louisiana, the law of Mississippi, and not that of Louisiana, must be the law of the case.¹

¹ CITED. *Supervisors v. Galbraith*, 9 Otto, 218; *Fitch v. Reiner*, 1 Flipp., 17.

Where a contract is by its terms to be performed in a State other than that in which it is made, the law of the State in which it is to be performed must govern. *Dickinson v. Edwards*, 58 How. (N. Y.) Pr., 24; *Dunn v. Welsh*, 62 Ga., 241. But a contract by a resident of one State, made and to be performed in another, is governed by the *lex loci contractus* as regards its validity and construction, and not by the *lex fori* where remedy is sought for a breach. *Williams v. Curr*, 80 N. C., 204.

The place of contract is not the place where the note or bill is made, drawn, or dated; but the place where it is delivered from drawer to drawee, from promisor to payee, from indor-

sers to indorsee. *Overton v. Bolton*, 9 Heisk. (Tenn.), 702.

The question whether a note is negotiable in form is to be decided by the law of the State where it was made, not of that where it is sued. *Stitz v. Mathews*, 63 Mo., 371.

The endorsement of a negotiable note is a new contract, and is governed by the law of the place where it is made, and not by that of the place where the remedy is sought. *Burrows v. Hannegan*, 1 McLean, 315; *Davis v. Clemson*, 6 Id., 622; *Bank of Illinois v. Brady*, 3 Id., 268; *Dundas v. Bowler*, Id., 307; *Orr v. Lacy*, 4 Id., 243.

The liability of the endorser of a note is governed by the law of the State where it is payable. *Gaylord v. Johnson*, 5 McLean, 448.

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By the law of Mississippi, where the indorsee sues the maker, the "defendant shall be allowed the benefit of all want of lawful consideration, failure of consideration, payments, discounts, and set-offs, made, had, or possessed against the same, previous to notice of the assignment."

Where the notes were originally given for the purchase of a plantation, which plantation was afterwards reclaimed by the vendor (under the laws of Louisiana and the deed), and, in the deed of reconveyance made in consequence of such reclamation, the plantation remained bound for the payment of these notes, these facts do not show a "want of lawful consideration, failure of consideration, payment, discount, nor set-off," and consequently furnish no defence for the maker when sued by the indorsee.

The fact, that the notes were indorsed "*Ne varietur*" by the notary, did not destroy the negotiability of the notes.

As against the maker of a note or acceptor of a bill, payable at a specified place, it is not necessary for the holder to make a demand at such place, as a condition precedent to bringing action; and, therefore, it is not necessary to aver such a demand in his declaration, or prove it at the trial.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for Louisiana.

Ann Brabston was a citizen of Mississippi, and Gibson of Louisiana.

The facts in the case were somewhat complicated. There was a "case agreed" in the Circuit Court, which is inserted in this statement; but in consequence of a reference to long

A party residing in one State who goes into another State and there makes an agreement with a citizen of that State for a loan, lawful by its laws, but usurious under the laws of the borrower's State, cannot render his note given for such loan void by making it payable in his own State. Nor does the fact that the obligation is executed in the latter State, and sent to the lender by mail, require that it should be governed by the usury laws of the State where it was signed. *Wayne County Savings Bank v. Low*, 81 N. Y., 566; s. c., 8 Abb. N. Cas., 300.

Where a promissory note is made in this State, by a resident thereof, bearing date here, by its terms payable at some place in the State, with no rate of interest specified, and no intention of the maker existing that it will be taken elsewhere for discount, if it is first negotiated in another State, at a rate of interest lawful there, but greater than that allowed by the usury laws of this State, it is invalid. [Reviewing many authorities.] *Dickinson v. Edwards*, 77 N. Y., 573; affirming 13 Hun., 405.

A contract made in another State

will be presumed to have been entered into with reference to the laws of that State, but in the absence of any finding on the subject in an action on the contract in this State, it will be assumed in favor of the judgment that the *lex loci* is the same as the *lex fori*. *Chapin v. Dobson*, 78 N. Y., 74.

A note was made in Kansas payable in Missouri, and contained a stipulation to pay attorney's fees if suit should be instituted on the note. The note was indorsed and transferred before maturity to the bank at which it was made payable. *Held*, that the maker was liable to the bank on the note, although the Supreme Court of Missouri *held* that such a note was not negotiable, the note being negotiable in Kansas. *Howenstein v. Barnes*, 5 Dill., 482.

A promissory note made in Oregon, and payable in Scotland, is to be considered as if made in Scotland. But the validity of a mortgage upon real property in Oregon, to secure the payment of such a note is to be tested by the laws of Oregon. *Oregon &c. Trust &c. Co. v. Rathburn*, 5 Sawy., 32.

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deeds, which are made a part of the case agreed, it may be proper to collect the facts stated in those deeds, and throw them into the form of a continued narrative.

The case was this.

On the 16th of May, 1837, William Harris, a citizen of Mississippi, residing in Adams County in that State, became indebted to the heirs of Epheus Gibson, in the sum of \$11,000, bearing eight per cent. interest till paid.

On the 24th of March, 1838, Harris purchased from Tobias Gibson, the defendant in error, who was then the owner of a plantation of 1,219 acres in the parish of Concordia in Louisiana, and of twenty-four slaves thereon, an undivided moiety of the said plantation and slaves, whereby he and Gibson became tenants in common thereof.

On the 11th of March, 1839, Harris became indebted to the Agricultural Bank of Mississippi, in the sum of \$25,272.02, for which he gave his two promissory notes to the said bank, both dated on that day, one of them for \$6,398.55 payable on the 1st of February, 1840; the other of them for \$18,873.47, payable on the 1st of April, 1840.

On the 16th of March, 1839, Harris executed a mortgage of his undivided moiety of the plantation and slaves purchased *from Gibson to the Agricultural Bank of Mississippi, to secure the payment of these two notes. [*264

On the 24th of December, 1839, Harris executed a second mortgage of the same property to the heirs of Epheus Gibson, to secure the payment of the debt due to them.

On the 24th of December, 1839, Harris and wife resold to Tobias Gibson the undivided moiety of the plantation and slaves (subject to these two mortgages), for the sum of \$70,000, which was to be thus paid by Gibson. He was to pay off the two mortgage debts in the following manner:— The two notes held by the Agricultural Bank of Mississippi in four annual instalments during the years 1840, 1841, 1842, and 1843; the debt to the heirs of Epheus Gibson in three annual instalments during the years 1844, 1845, 1846 (which arrangement and postponement of payments by the bank and the heirs of Epheus Gibson Harris became responsible for); and for the balance of the \$70,000, of purchase-money, viz., \$29,510.79, he, Gibson, gave Harris (then being a citizen and resident of Mississippi) four promissory notes, all dated at the parish of Concordia, on the 24th of December, 1839, and payable at the Agricultural Bank of Mississippi, viz.:—

One for \$2,000, payable on the 1st of February, 1844.

One for \$6,000, payable on the 1st of February, 1845.

One for \$7,000, payable on the 1st of February, 1846.

One for \$14,510.79, payable on the 1st of February, 1847.

But he, Gibson, was to have the liberty of extending the time of the payment of each note one year more, on payment of eight per cent. interest. The said four notes were each respectively marked "*Ne varietur*" by the parish judge, at the time of the act of sale, to identify the same therewith.

As security for the fulfilment of the terms of purchase, Gibson, in the act of sale, specially mortgaged and hypothecated, in favor of Harris, the property so purchased; and he also covenanted that it was "a sale in which the power or right of redemption was specially reserved in favor of the vendor (Harris), for the period of ten years from the date of the act of sale, to be by him exercised at any time within the said period of ten years, agreeably to the provisions of the laws of the State of Louisiana."

Those provisions are the following (Civil Code of Louisiana, § 2031, § 2545 to § 2566):—

§ 2031. "A sale may be made conditioned to be void, if the vendor chooses to redeem the property sold."

§ 2545. "The right of redemption is an agreement or petition, by which the vendor reserves to himself the power of taking back the thing sold by returning the price paid for it."

*265] *§ 2546. "The right of redemption cannot be reserved for a time not exceeding ten years."

§ 2550. "A person having sold a thing, with the power of redemption, may exercise the right against a second purchaser, even in case such right should not have been mentioned in the second sale."

§ 2553. "The person who purchases an estate under a condition of redemption has the fruits until the vendor exercises his right of redemption."

§ 2565. "The vendor who exercises the right of redemption is bound to reimburse to the purchaser, not only the purchase-money, but also the expenses resulting from the necessary repairs, those which have attended the sale, and the price of the improvements which have increased the value of the estate."

§ 2566. "When a vendor recovers the possession of his inheritance, by virtue of the power of redemption, he recovers it free from any mortgages or encumbrances created by the purchaser, provided full possession be recovered within the ten years, as provided by § 2546."

On the 21st of January, 1840, Harris, then being a citizen and resident of Mississippi, executed a promissory note (for what particular consideration does not appear), dated at Natchez, for \$6,000, payable to Ann Brabston, the plaintiff

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in error, who was also a citizen and resident of Mississippi, twelve months after date, and delivered it to her there.

On the same day, Ann Brabston gave Harris a receipt, also dated at Natchez, acknowledging that she had received from him two of the above stated notes of Gibson, viz., that for \$6,000, payable on the 1st of February, 1845, and that for \$7,000, payable on the 1st of February, 1846, "to be held by me as collateral security for the payment of the note of William Harris to me," executed the same day.

The indorsement, transfer, and delivery of these notes by and between Harris and Brabston, were made at Natchez, in Mississippi. The whole transaction was without any notice, knowledge, or consent, on the part of Gibson.

On the 21st of January, 1841, the note of Harris and Brabston for \$6,000 (as collateral security for which the two notes of Gibson of \$6,000 and \$7,000 were given to her) became due; it was not presented for payment, renewed, or protested (so far as appears); no notice thereof, or that the said note or that the two other notes were held by Brabston, was given to Gibson; and Brabston then was, and at all times since has continued to be, the holder of the note of Harris, dated the 21st of January, 1840.

*On the 18th of September, 1841, Harris claimed his right of redemption, and thereupon Gibson and [*266 wife reconveyed to him, by an authentic act, dated that day, all the property conveyed to him by Harris on the 24th of December, 1839, for the consideration of \$70,000, which he acknowledges to have received in the manner following, viz.:—It was recited in the said act of reconveyance, that the two mortgage debts to the Agricultural Bank of Mississippi, and to the heirs of Epheus Gibson, still remained unpaid; and Harris covenanted to assume the payment thereof himself, and to guarantee Gibson against any personal liability therefor; as to the remaining part of the said \$70,000, viz., the \$29,510.79, for which Gibson had given his four promissory notes to Harris, the first and last of them, those for \$2,000 and \$14,510.79, were actually surrendered and returned, and as to the remaining two, for \$6,000 and \$7,000, it was stipulated that "they are not returned to the said Gibson at the passing of this act, but the said Harris hereby stipulates and guarantees the return and cancelling of said notes; and, to secure the same, hereby specially mortgages in favor of said Gibson all the property" then conveyed, with the growing crops.

On the 8th of November, 1841, Gibson produced before the parish judge of Concordia the two notes for \$2,000 and

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\$14,510.79; and the mortgage granted for the amount thereof was thereupon declared by the said judge to be so far annulled.

On the — of March, 1843, Harris was declared a bankrupt by a decree of the District Court of the United States for the Louisiana District, under the bankrupt law of the United States; and, by further proceedings in that court, obtained a final discharge and certificate.

On the 14th of February, 1846, Brabston commenced this suit against Gibson, in the Circuit Court of Louisiana, to recover the whole amount of the two notes in question, amounting to \$13,000, with interest and costs.

The answer of Gibson was as follows.

“The Answer of Tobias Gibson to the Petition of Ann Brabston, exhibited against him in the Court aforesaid.

“This defendant denies all and singular the matters and things set forth and alleged in plaintiff's petition, except such as are hereafter specially confessed and admitted. Defendant admits the execution of the two notes sued on, and that he signed the same and delivered them to William Harris, to whose order they are payable, at the time of their execution. But defendant wholly denies that plaintiff is the owner thereof, or entitled *to sue thereon. Further answering, *267] defendant states that both the notes sued on were executed and given to the said William Harris, in sole consideration of the purchase, and for a part of the price, of one undivided half of a certain plantation, and certain slaves thereon, purchased by said defendant from said Harris, on the 24th day of December, 1839; which purchase, as well as execution and delivery of said notes, was evidenced by an authentic act of sale, passed before George W. Keeton, parish judge of the parish of Concordia in this State, on the day and year last aforesaid, and a duly certified copy of which act is hereto annexed, and made a part of this answer.

“Defendant further alleges, that in said act of sale said vendor, Harris, specially stipulated for and reserved to himself the right of redemption of the property so sold for the period of ten years from the date of said act, as will more fully appear by reference thereto, and said notes sued on were identified with said act, and marked *Ne varietur* by the parish judge, as appears upon their face, as also in said act.

“Defendant further alleges, that afterwards, to wit, on the 18th day of September, 1841, and long before the maturity of either of the notes sued on, the said William Harris claimed

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the right of redemption, so reserved for him in the act of sale above mentioned, and according to the stipulations and provisions set forth and contained in said act; wherefore, and in accordance with said claim by said Harris, and of the stipulations of said original act of sale, this defendant did, on the said 18th day of September, 1841, at the parish of Concordia, and in conjunction with his wife, Amanda Fletcher, by authentic act passed before James Dunlap, judge and *ex officio* notary public in and for said parish of Concordia, resell and reconvey said property conveyed to him by said first-mentioned act to the said Harris, according to the rights and claims of said Harris to redeem the same.

"And defendant further states, that by said last-mentioned act said Harris did, in part consideration thereof, cancel the two notes sued on, and wholly discharge and release defendant from all liability therefor; all of which will more fully appear by reference to an authenticated copy of said last-mentioned act, which is hereto annexed and made part of this answer.

"Defendant further states, that both said acts above mentioned were, upon their execution, respectively, duly recorded in the proper office. And so said defendant says that said notes, by virtue of said claim of the right of redemption, and of the reconveyance made in consequence thereof by this defendant and wife to said Harris, and by virtue of the stipulations contained in said act of resale, and by operation of law, were *wholly discharged, and this defendant released from all liability therein. [*268

"Further answering, defendant says that said notes sued on were not transferred to said plaintiff *bona fide* in the ordinary course of business, nor did she obtain possession thereof as owner, nor is she the owner thereof; but said notes were delivered to said plaintiff, and received and held by her, as collateral security for the payment of a certain note, drawn by said Harris, and held by said plaintiff, for the sum of six thousand dollars, dated Natchez, 21st January, 1840, and payable twelve months after date; that said plaintiff has never instituted suit upon said last-mentioned note, nor made any attempt to enforce the collection of the same.

"Defendant further states, that said notes were so deposited with said plaintiff, as collateral security as aforesaid, without his knowledge or consent, and in fraud of his rights, and that he had no notice whatever that said plaintiff held said notes until long after his reconveyance to said Harris as aforesaid, nor until long after he had transacted with said

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Harris in relation to said notes as aforesaid, and had been wholly released and discharged therefrom.

"Defendant further states, that said notes are payable in the State of Mississippi, and governed in their obligation and validity by the laws of said State, and that the transfer or pledge of said notes, made by said Harris to said plaintiff, as collateral security for the payment of his own note as aforesaid, was also made in the State of Mississippi, and is governed by the laws of said State. And defendant avers, that by the laws of said State of Mississippi, upon the redemption of said Harris of the property, for a portion of the price of which said notes were given as aforesaid, and upon the release and discharge of said notes by said Harris, as aforesaid, said notes were wholly satisfied and discharged, nor can said plaintiff, by the laws of said State, maintain any action thereon.

"Wherefore said defendant prays that plaintiff's claim be rejected, with costs, &c., and that a jury trial be awarded in this case, and for all other relief."

When the cause came on for trial, the following case was agreed upon.

Case Agreed.

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"1st. The defendant, Tobias Gibson, on the 24th day of December, 1839, executed the promissory notes sued on in *269] this *case, under the circumstances and for the consideration set forth in the deed of sale executed to him by the payee of said notes, William Harris, a copy of which act or deed of sale is hereto annexed, and forms a part of this case, as also the said two notes, which are respectively marked A, B, and C.

"2d. On the 21st of January, 1840, the payee of the said two notes, William Harris, being then the holder thereof, indorsed and delivered the same to Mrs. Ann Brabston, the plaintiff, as collateral security, to secure the payment of the said Harris's note to the said Ann Brabston, dated on the said 21st of January, 1840, and payable twelve months after date, for the sum of six thousand dollars, and on the same notes mentioned in a receipt from the said Ann to the said Harris, under date of the said 21st of January, 1840, which is hereto annexed, and makes part of this case, and marked D.

"3d. On the 18th of December, 1841, the said defendant, Tobias Gibson, did reconvey to the said William Harris all

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the property mentioned in the act of sale from Harris to the said Gibson, of the date of the 24th of December, 1839, before mentioned and referred to, and took back and cancelled all the notes mentioned in said act of December, 1839, except the two notes now sued on, and in and by the said act reserved to himself a mortgage to secure him against liability on said two notes, as is set forth in said act of reconveyance, which is hereto annexed and marked E, and makes part of this case.

"4th. The plaintiff is now the holder of the note of the said Harris for six thousand dollars, dated the 21st of January, 1840, and payable twelve months after date, and which is the same note mentioned in the receipt from said plaintiff to said Harris, of the 21st of January, 1840, before referred to and made part of this case, and the said note is now in the hands of the plaintiff and unpaid, and is hereto annexed and made part of this case, and marked F.

"5th. The mortgage reserved by the defendant, Gibson, in the act of reconveyance from him to the said Harris, of the 18th of September, 1841, to secure the return and cancelling of the said two notes, is duly recorded and subsisting and unreleased, as appears by the certificate of the recorder hereto annexed, marked G, and made part of this case.

"6th. The payee of the said two notes, William Harris, was, on the — day of March, 1843, declared a bankrupt by a decree of the District Court of the United States for the Louisiana District, under the bankrupt law of the United States, and by the further proceedings in bankruptcy before said court has obtained his final discharge and certificate.

"7th. Harris, the payee, resides in the State of Mississippi, and the notes sued on were indorsed and [*270 transferred to plaintiff, and the receipt given by her therefor, made and executed by her at Natchez, in the State of Mississippi, in which State said notes are payable. If on this case, as herein stated, the law be for the plaintiff, then judgment to be entered for the said plaintiff for the sum of six thousand dollars, with ten per cent. per annum interest, from the 21st of January, 1840, till paid; and if the law be for the defendant, then judgment to be entered for the defendant.

"PRENTISS & FINNEY, *Defendant's Attorneys.*

ROB. MOTT, *for Plaintiff.*"

Upon this agreed case, the Circuit Court gave judgment for the defendant, Gibson; whereupon the plaintiff sued out a writ of error, and brought the case up to this court.

Whilst the cause was pending, Ann Brabston died, and

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James M. Brabston, her administrator, was substituted in her place.

It was argued by *Mr. Johnson* (Attorney-General), for the plaintiff in error, and by *Mr. Gilpin* and *Mr. Walker*, for the defendant in error.

For the plaintiff in error, it was contended that judgment ought to have been rendered for the plaintiff in error. Because,—

1. That, independent of the statute of Mississippi, the plaintiff in error was entitled to a judgment, and that the *ne varietur* on the notes does not restrain their negotiability, or make it the duty of the indorsee to inquire into the consideration. *Fusilier v. Bonin*, 12 Mart. (La.), 235; *Canfield v. Gibson*, 1 Mart. (La.) N. S., 145; *Abat v. Gormley*, 3 La., 241; *King v. Gayoso*, 8 Mart. (La.) N. S., 370.

2. That the statute has no operation on the notes, the suit having been instituted and prosecuted in Louisiana, its operation being confined to actions commenced and sued upon promissory notes, &c., in Mississippi. *Howard & Hutchinson*, Statutes, 373, 374; *Bank of United States v. Donnelly*, 8 Pet., 361, 372, 373.

3. That if the statute does apply to notes given in Louisiana and made payable in Mississippi, it affords no defence in this case, inasmuch as there was neither a want of lawful consideration, nor a failure of consideration, nor a payment, discount, or set-off, within the true meaning of the statute.

4. That if there was a want of consideration, &c., the statute affords no defence, inasmuch as the defendant had *271] notice of the *assignment of the notes, within the true meaning of the statute. *The Ploughboy*, 1 Gall., 41; *Brush v. Ware*, 15 Pet., 111, 113.

For the defendant in error it was contended,—

1. The right of recovery by the assignee is governed by the law of Mississippi, where her contract was made, and was to be executed.

These notes, though drawn in Louisiana, were indorsed by Harris to Brabston in Mississippi (Record, § 7 of Case Agreed), and they were payable in Mississippi. The contract, therefore, between the maker (Gibson) and the indorsee (Brabston) was made in Mississippi, and is governed by its laws. *Story*, *Confl. of Laws*, §§ 272, *a*, 278, *a*, 280, 281, 316, *a*, 354; *Story*, *Prom. Notes*, §§ 171, 172; 2 Kent, Com, 458; *Slacum v. Pomery*, 6 Cranch, 221.

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Besides, it was to be executed in Mississippi,—the notes were to be paid there. The law of Mississippi, therefore, regulated in every respect the mode and circumstances of payment,—the rights of the parties paying or to be paid. Story, Promissory Notes, § 165; 2 Kent, Com., 461; *Robinson v. Bland*, 2 Burr., 1078; *Bank of Washington v. Triplett*, 1 Pet., 34; *Boyce v. Edwards*, 4 Pet., 123; *Musson v. Lake*, 4 How., 278; *Thompson v. Ketchum*, 4 Johns. (N. Y.), 288; *Fanning v. Consequa*, 17 Id., 518; *Shewell v. Hopkins*, 1 Cow. (N. Y.), 108; *Prentiss v. Savage*, 13 Mass., 23; *Vidal v. Thompson*, 11 Mart. (La.), 23; *Andrews v. Herriot*, 4 Cow. (N. Y.), 508, 510; *Cox v. United States*, 6 Pet., 172, 203.

2. The laws of Mississippi, which affect and regulate the rights of these parties, provide that, until the maker (Gibson) received notice of the assignment of the notes in question by the payee (Harris) to the assignee (Brabston), he was entitled, notwithstanding the assignment, to claim the benefit, against the assignee, of every payment, discount, or set-off, which could legally exist between himself and the payee.

How. and Hutc., Miss. Dig., p. 373, §§ 12, 13:—"All bonds, obligations, single bills, promissory notes, and all other writings, for the payment of money or any other thing, shall and may be assigned by indorsement, whether the same be made payable to the order of the assignor of the obligee or payee or not; and the assignee or indorsee may sue in his own name, and maintain any action which the obligee or payee might or could have sued or maintained thereon previous to assignment; and in all actions commenced or sued upon any such assigned bond, obligation, bill single, or promissory note, or other writing as aforesaid, the defendant shall be allowed the *benefit of all want of lawful consideration, failure of consideration, payments, discounts, [*272 and set-offs, made, had, or possessed against the same, previous to notice of the assignment, any law, usage, or custom in anywise to the contrary notwithstanding, in the same manner as if the same had been sued and prosecuted by the obligee or payee therein; and the person or persons to whom such instruments so payable are assigned may maintain an action against the person or persons who shall have indorsed or assigned the same, as in cases of inland bills of exchange; provided, that where any debt shall be lost by the negligence or default of the assignee, the assignor or assignors shall not be liable, any such assignment notwithstanding."

§ 13 provides that, where a surety or indorser pays an obligation or protested note, in default of the obligor or maker, the obligation or note shall be assigned to him, and

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he shall have a right of action thereon against the principal debtor.

In the case of *Parham v. Randolph*, 4 How. (Miss.), 453, Randolph sold land in Louisiana and received in payment certain notes "made payable at the Agricultural Bank of Mississippi," on which Parham was indorser. The notes were assigned by Randolph to the Planters' Bank, who recovered judgment against the indorser. The title of Randolph to the land proved bad, and his vendee was evicted. The indorser, Parham, prayed for an injunction and rescission of the contract, which was refused by the inferior court, and this appeal taken. It was contended that the assignee, the Planters' Bank, being an innocent holder, could not be affected by failure of title; but the Court of Errors (Sharkey, C. J.) said,—“This position is untenable. The statute (of Mississippi) gives the maker the same defence against the holder that he had against the payee of the note. These notes were made payable at the Agricultural Bank.”

3. The evidence in the record shows, that on the 18th of December, 1841, more than four years before either of the notes of Gibson, which were assigned by the payee (Harris) to Brabston, had become due, and before this action was commenced upon them, they were both completely annulled and discharged.

It is shown by the record (§ 1 of the Case Agreed) that the notes were executed by Gibson as a part of the purchase-money and consideration of a tract of land and some negroes bought by him from the payee (Harris), and that in the act of sale it was “expressly stipulated between the parties (Gibson and Harris), that it was a sale in which the right of redemption was specially reserved in favor of the vendor *273] (Harris), for the *period of ten years from the date of the sale (24th December, 1839), to be exercised by him at any time within that period, agreeably to the provisions of the laws of the State of Louisiana.” (These laws are quoted in the statement of the case.)

It is shown by the record that Harris did, on the 18th of September, 1841, exercise his right of redemption; and by the Case Agreed, that Gibson did, on that day, reconvey to him all the property sold, and acknowledged to have received back the whole purchase-money and consideration, of which the amount of the two notes now sued on was declared to be a portion; and that all the promissory notes given at the time of the original sale had been actually taken back and were cancelled, except the two notes for \$13,000 now sued on, which “were not then returned to Gibson, but Harris

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stipulated and guaranteed the said two notes should be returned to Gibson and cancelled, and to secure the performance of this he mortgaged all the property in favor of Gibson."

4. The evidence in the record shows, that neither at the time when the notes in question were assigned by Harris to Brabston, at Natchez, namely, the 21st of January, 1840, nor at the time when Harris exercised his right of redemption and Gibson reconveyed the property, namely, the 18th of December, 1841, nor before the time when this action was commenced, namely, the 14th of February, 1846, had any notice of the assignment of the notes in question, direct or implied, been given to or received by the defendant, Gibson, either from the payee (Harris) or the assignee (Brabston).

No *direct* notice is averred, or offered to be proved by the plaintiff, or appears upon the record. It is denied by the defendant, Gibson, who avers that the assignment was without his knowledge or consent, and in fraud of his rights, and that he had no notice of it whatever, until long after his reconveyance of the property to Harris, and his release and discharge from the notes in question.

No *implied* notice, if such were sufficient to contradict the positive requisitions of the statute of Mississippi, can be inferred from any evidence in the record. The circumstance relied upon in argument, namely, that the notes in question were not cancelled and delivered up to the defendant at the time of the reconveyance of the property, and that he reserved a mortgage to secure their cancellation and delivery to him, affords no ground for such an inference.

Allein v. The Agricultural Bank, 3 Sm. & M. (Miss.), 57.

This was a suit by the assignee of a note against the maker, who had no notice of the assignment, and had paid the note *without its being delivered up, taking a bond conditioned for its subsequent delivery. It was held by the [274 Court of Errors, that a payment of a note without its delivery, where the maker had no notice of its transfer, is good; and is protected by the operation of the statute of Mississippi. The fact of its non-delivery at the time might possibly raise a presumption that it had been assigned; but the proof of notice to the maker of the assignment, is a matter requiring a higher degree of evidence than that of presumption. The obligation of indemnity extended merely to a future delivery of the note. The fact of taking indemnity might be considered as a presumptive notice of assignment, but still of no higher grade of evidence than that which arises from the non-delivery of the note, and, so far as it was intended as a protection against payment in the hands of other holders, was

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unnecessary ; because such payment could not be enforced by them, by the terms of the statute, without proof of notice of the assignment to them. The statute allows the defendant, in all actions upon such instruments, whether negotiable or not, the benefit of all want of legal consideration, failure of consideration, payments, discounts, profits, made, had, or possessed, against the same previous to notice of assignment. This has the effect to change the rule in many particulars as established by the law merchant. The assignee takes the note, subject to all objections and incumbrances that appertain to it, of the kind described in the statute, up to the time of notice of the assignment.

5. The grounds upon which it is attempted to withdraw this contract, and the rights of the defendant (Gibson), in this action, from the provisions of this statute of Mississippi are not sustained, either by the evidence in the record, or the principles established by legal decisions.

There is not a single circumstance to warrant the allegation of fraudulent coöperation between the maker (Gibson) and the payee (Harris) against the assignee (Brabston). On the contrary, if there is evidence of fraud, it is in the withholding, by the assignee (Brabston), of all notice of the assignment, which was contrary to law ; in neglecting also to give Gibson any notice of the non-payment at maturity of Harris's own note of \$6,000 (for which the notes in question were held merely as collateral security) ; and in adopting no proceedings whatever against her principal debtor. These acts, whether of fraud or gross negligence, deprived Gibson of the opportunity to protect himself, at the time of reconveying the property, and also at the time of Harris's bankruptcy.

There is nothing in the form or substance of the notes in *275] *question which exempts the party who commences an action upon them from the provisions of the statute of Mississippi. The indorsement of "*Ne varietur*" did not give, as is alleged, "increased confidence and additional value" to their negotiable character ; on the contrary, it gave notice to the assignee that they were connected, when made, with other transactions, into which, receiving them as she did, not "in the usual course of business," but as collateral security, she was bound to inquire. The cases of *Fusilier v. Bonin*, 12 Mart. (La.), 235 ; *Canfield v. Gibson*, 1 Mart. (La.), N. S., 145, and *Abat v. Gormley*, 3 La., 241, are decisions, not of the law of Mississippi, but of Louisiana, nor do they go further than to hold that the mere indorsement of "*Ne varietur*," unaccompanied with other circumstances, does not destroy in Louisiana the negotiable character of bills or notes,

taken "in the usual course of business." Indeed, *Fusilier v. Bonin* goes to show that, if the notarial act accompanying the note marked "*Ne varietur*" exhibits a right existing in the maker to cancel the note, the holder could not recover. In *State Bank v. Orleans Navigation Co.*, 3 La., 294, 304, a third party was held bound to notice a defect disclosed by an instrument referred to in the bill.

The facts that the assignment of the notes was as a pledge or collateral security, and that the reconveyance of the property was subsequent to the assignment, though in accordance with the stipulation entered into, by a public notarial act, between the parties to the notes at the time they were made, are equally unavailing as grounds of exemption from the provisions of the statute of Mississippi.

The allegation that the rights of the assignee (Brabston) are to be governed by the law, not of Mississippi, but of Louisiana, because the notes were accompanied by a mortgage of property in Louisiana; and that, if so governed, the assignee could recover in this action against the maker, upon the principles of the "law merchant," free from all equities he might have, cannot be sustained in either respect.

It has already been shown, that, although the notes were originally made in Louisiana, they were not payable there, and therefore not governed by her laws. If they were, the "law merchant" would not authorize the recovery by the assignee.

Because the notes of which Brabston now seeks to recover the whole amount of \$13,000 were not taken in the usual course of business, or in payment or extinguishment of a debt, but merely as collateral security for a note of \$6,000. *Collins v. Martin*, 1 Bos. & P., 651; *Coddington v. Bay*, 20 Johns. (N. Y.), 651; *Depeau v. Waddington*, 6 Whart. (Pa.), 232; *Petrie v. Clark*, *11 Serg. & R. (Pa.), 377; *Brooks v. Whitson*, 7 Sm. & M. (Miss.), 520; *Homes v. Smith*, 16 [*276 M., 180; *Norton v. Waite*, 20 M., 177; *Swift v. Tyson*, 16 Pet., 1; *Stalker v. McDonald*, 6 Hill (N. Y.), 93.

Because the terms of the receipt on which the notes of Gibson were assigned to Brabston place him in the position merely of a guarantee to her, to the extent of \$13,000, for the payment by Harris of his note to her for \$6,000; and therefore it is incumbent on her, before resorting to the guarantee, to show notice given to Gibson of Harris's failure to pay the guaranteed debt, prompt proceedings against Harris for its recovery, and no injury to Gibson by reason of any neglect therein. The evidence in the record exhibits no proof of such notice or proceedings; but, on the contrary, it

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shows the surrender by Gibson, from want of such notice, of property sufficient for his protection; the possession by Harris of large property when the guaranteed debt became payable; and his insolvency and discharge before Gibson's knowledge of a claim against him. *French v. Bank of Columbia*, 4 Cranch, 161; *Douglas v. Reynolds*, 7 Pet., 126; 2 Stark on Ev., 266; *Phillips v. Astling*, 2 Taunt., 206; *Cambridge v. Allenby*, 6 Barn & C., 383; *U. States v. Hillegas*, 3 Wash. C. C., 75; *Ramsay v. West. Bank*, 2 Pa., 205; *Johnston v. Chapman*, 3 Pa., 19; *Isett v. Hoge*, 2 Watts (Pa.), 129; *Thomas v. Callihan*, 5 Mart. (La.) N. s., 181; *Styles v. McNeill*, 6 Id., 296; *Mitchell v. Dall*, 2 Har. & G. (Md.), 75; *Read v. Cutts*, 7 Me., 186.

Because it is neither proved by the record, admitted, nor agreed, that the notes on which this action is brought were presented for payment, or that payment thereof was demanded, either at the Agricultural Bank of the State of Mississippi, or on the day of the maturity thereof, or that any notice of presentation, or of non-payment thereof, was given to the said Gibson or Harris. Story on Prom. Notes, §§ 227-230; 3 Kent, Com., 97, 99; *Rowe v. Young*, 2 Brod. & B., 165; *U. S. Bank v. Smith*, 11 Wheat., 171; *Wallace v. McConnell*, 13 Pet., 136; *Mellon v. Croghan*, 3 Mart. (La.) N. s., 423, 431; *Smith v. Robinson*, 2 La., 405; *Morton v. Pollard*, 10 La., 552; *Warren v. Allnut*, 12 La., 454.

Mr. Justice McLEAN delivered the opinion of the court.

This writ of error is brought to review a judgment of the Circuit Court for Louisiana.

The action was founded on two promissory notes given by Tobias Gibson, and dated the 24th of December, 1839, in *277] which he promised to pay to William Harris, for value *received, at the "Agricultural Bank of the State of Mississippi," in one note, six thousand dollars, the 1st of February, 1845, and in the other, seven thousand dollars, the 1st of February, 1846. These notes were given in part consideration for a plantation and slaves in Louisiana, sold by William Harris to Gibson, to secure the payment of which and other notes a mortgage was executed on the property. The words "*Ne varietur*" were indorsed on the notes to identify them with the sale of the estate.

On the 21st of January, 1840, these notes were assigned, in the State of Mississippi, to the plaintiff, as collateral security for the payment of a note to her of the same date, given by Harris, who was a citizen of Mississippi, for six thousand dollars, payable twelve months after date. In the sale of the

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above property there was reserved to the vendor a right to repurchase it within ten years; and it appears there was a redemption of the property at the price for which it was sold, and a reconveyance to Harris was executed on the 18th of September, 1841. Two notes on Gibson were given up as a part of the consideration for the repurchase, but the above two notes for thirteen thousand dollars, having been assigned by Gibson to the plaintiff, were not surrendered, but Harris agreed that they should be given up and cancelled, and a mortgage was executed on the property to indemnify Gibson against them. The first mortgage for the consideration money was cancelled. Harris became bankrupt, and took the benefit of the bankrupt act in 1843.

The cause was submitted to the court on the facts agreed, and a judgment was rendered for the defendant. On several grounds, the plaintiff asks the reversal of this judgment.

The notes were given in Louisiana, but they were made payable and indorsed in Mississippi; consequently they are governed by the law of Mississippi. The law of the place where a contract is to be performed, and not the place where it was executed, applies. The indorsement of a note subjects the indorser to the obligations imposed by the law where the indorsement was made.

It is contended that, under the law of Mississippi, the defendant is not bound. The law referred to is in How. and Hutch. Dig., 373, which declares that "all bonds, obligations, single bills, promissory notes, and all other writings for the payment of money or any other thing, shall and may be assigned by indorsement," &c., and the assignee may bring an action, &c., "and in all actions commenced or sued upon any such original bond, obligation, bill single, or promissory note, or other writing as aforesaid, the defendant shall be allowed the *benefit of all want of lawful consideration, failure of consideration, payments, discounts, and [*278 set-offs, made, had, or possessed against the same previous to notice of the assignment."

The only question in the case which can arise under this statute is, whether the admitted facts constitute a defence to the action. The facts not being within the statute cannot be set up as a defence under it. They do not show "an illegal consideration, a failure of consideration, payment, discount, or set-off." There was no pretence of payment of these notes in the redemption of the property. They were declared to remain in force, and to be subject to extinguishment when obtained. The case cited, of *Parham v. Randolph*, 4 How. (Miss.), 453, was where the note was given for land, the title

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to which failed; the failure of the consideration was held a good defence against the note in the hands of an assignee. That case was clearly within the statute.

These notes, being negotiable, were assigned to the plaintiff, for a valuable consideration, without notice, prior to the act of redemption. The fact being a voluntary one by Harris, the assignor of the notes, it could in no respect prejudice the rights of his assignee. Under the laws of Louisiana, the right of redemption may be enforced against a purchaser of the thing liable to be redeemed, though that fact was not named in the second sale. And when a vendor recovers the possession of land, by virtue of the power of redemption, he takes it free of all encumbrances created by the purchaser.

But these principles can have no application to negotiable paper, though given for a thing purchased which the vendor may redeem. The purchaser who holds land or other property liable to be redeemed, reconveys the property only on the payment of the consideration money. And whether this payment be made by returns of the notes given, in money, or in some other manner acceptable to the parties, cannot be material. In the present case, it seems, Gibson was content to take a mortgage on the property reconveyed, to indemnify him against the outstanding notes.

From the fact that the notes were not given up, and an indemnity against him having been taken, a jury might well presume that Gibson had notice of the assignment. But this was not important to the right of the assignee. She stands unaffected by the reconveyance. The indorsement of the words "*Ne varietur*" could have no effect on the notes which were payable in Mississippi, and which were indorsed to the plaintiff in that State. Nor could they have affected the negotiable character of the notes, had they been assigned in the usual course of business in Louisiana. *Abat v. Gormley*, 3 La., 241.

These notes were assigned to the plaintiff, as collateral security, by Harris, for the payment of his note for six thousand dollars, executed at the same time, which constituted a legal transfer of the notes, for the purpose stated. On the credit of these notes, it may be presumed, the plaintiff received the note of six thousand dollars from Harris.

If Gibson be considered as a guarantor, as contended, yet a notice was not necessary, as he received an ample indemnity against the six thousand dollars by the mortgage. But he was not a guarantor in any sense of that term. Harris assigned the notes as security, and, under the circumstances, he cannot complain of want of notice of his own default.

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No demand of the notes, when due, at the Agricultural Bank of Mississippi, where they were made payable, was necessary. The action is against the maker of the notes, and if the money was in the bank, or if the party was there with the money to pay the notes on presentation, it is matter of defence, and consequently the demand at the bank need not be averred in the declaration, nor proved on the trial. This question was fully considered and decided in *Wallace v. McConnell*, 13 Pet., 136.

We think the judgment of the Circuit Court must be reversed, and the cause remanded to that court for further proceedings, conformably to this opinion.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs, and that this cause be, and the same is hereby, remanded to the said Circuit Court for further proceedings to be had therein in conformity to the opinion of this court.

***SAMUEL DAVIS, PLAINTIFF IN ERROR, v. THE POLICE JURY OF THE PARISH OF CONCORDIA. [*280**

The treaty of St. Ildefonso, by which Spain ceded Louisiana to France, became operative to transfer the sovereignty upon the day of its date, viz. the 1st of October, 1800.¹

The executive and legislative branches of the government of the United States have always maintained this position, and this court concurs with them in its correctness.

The preceding case, p. 127, of *The United States v. Reynes* referred to.

By the laws of nations, all treaties, as well those for cessions of territory as for other purposes, are binding upon the contracting parties, unless when otherwise provided in them, from the day they are signed. The ratification of them relates back to the time of signing.²

¹ CITED. *United States v. Martin*, 14 Fed. Rep., 820; s. c., 8 Sawy., 478.

² It is undoubtedly true, as a principle of international law, that, as respects the rights of either government under it, a treaty is considered as concluded and binding from the date

of its signature. In this regard the exchange of ratifications has a retroactive effect, confirming the treaty from its date. But a different rule prevails where a treaty operates on individual rights. The principle of relation does not apply to rights of this character,

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Where territory is ceded, the national character continues for commercial purposes, until actual delivery; but between the time of signing the treaty and the actual delivery of the territory, the sovereignty of the ceding power ceases, except for strictly municipal purposes, or such an exercise of it as is necessary to preserve and enforce the sanctions of its social condition.³

The power to grant land or franchises is one of those attributes of sovereignty which ceases.⁴

The Spanish Governor of Louisiana had, therefore, no right to grant a perpetual ferry franchise on the 19th of February, 1801; and, consequently, it is not property which was protected by the treaty between France and the United States.⁵

THIS case was brought up from the Supreme Court of the State of Louisiana, by a writ of error issued under the twenty-fifth section of the Judiciary Act.

As the decision of the court turned upon the single point when the treaty of St. Ildefonso became operative, so far as to extinguish the right of the Spanish governor to grant a perpetual franchise, it is not necessary to give a detailed statement of the facts in this case, nor of the arguments of counsel upon the points which were not included in the decision of the court.

The following summary will sufficiently explain the case.

Davis, the plaintiff in error, filed his petition in the Ninth District Court of the State of Louisiana, in and for the Parish of Concordia, on the 7th of February, 1840, in which he sets forth, that the Marquis de Casa Calvo, then Governor-General of the Province of Louisiana, on the 19th of February, 1801, granted to one Thomas Thompson, then of said parish, the privilege of a ferry at the post of Concordia, in said parish, opposite to the then town, now city, of Natchez, as a privilege to be attached to the plantation of said Thompson, which he then possessed, in order that from that place he might have and enjoy the exclusive privilege, &c., for reasonable and customary toll, as it might be established; and on condition that he, the said Thompson, would clear a certain public road or highway from the said post of Concordia to the Bayou Cocadelle *(Cocodrillo), in said parish. That Thompson fully performed the said condition, as appears by the certificate of Joseph Vidal, the commandant at said post of Concordia. That Thompson entered upon the privilege aforesaid, and performed the duties,

which were vested before the treaty was ratified. In so far as it affects them, it is not considered as concluded until there is an exchange of ratifications. *Haver v. Yaker*, 9 Wall., 34.

³ FOLLOWED. *United States v. D'Au-terive*, 10 How., 623.

⁴ *S. P. Montault v. United States*, 12 How., 47; *United States v. Pillerin*, 13 Id., 9; *United States v. Rillieux*, 14 Id., 189; *United States v. Ducros*, 15 Id., 38.

⁵ CITED. *Montault v. United States*, 12 How., 51.

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and enjoyed the profits of said ferry, until the 16th of October, 1808, when he conveyed to Joseph Vidal all his right, title, and interest in and to said ferry and said tract of land. That the tract of land to which the privilege was attached was sold by Thompson to Vidal for the sum of four thousand dollars; when the land without the ferry would not at the time have been worth more than eight hundred dollars. That said Vidal entered into possession of said ferry and plantation, and continued to keep and enjoy the same until the year 1817, when he sold and delivered the same to petitioner. That petitioner thus became the owner of the said tract of land, and the lawful proprietor of the exclusive privilege of keeping said ferry. That by the laws, usages, and customs of the Spanish government at the date of said grant, said grant operates to the exclusion of any other ferry, for the distance of one league above and one league below. That the title of petitioner, acquired from the Spanish government, has also a prescriptive right, founded on the possession and enjoyment thereof by himself and vendors since 1801.

The petitioner then set forth that the Police Jury of the Parish of Concordia, in April, 1839, established a ferry across the Mississippi, from the town of Vidalia, in the parish of Concordia, to the city of Natchez, which conflicted with his right.

The answer admitted the establishment of the ferry by the Police Jury, averred their right to do so, and contested the plaintiff's claim upon grounds which it is not necessary here to mention. Evidence was taken on both sides.

On the 14th of June, 1841, the Ninth District Court gave judgment for the defendants.

The case was carried to the Supreme Court of Louisiana, which, at October term, 1841, reversed the judgment of the District Court, upon matters of evidence. It is reported in 19 La., 533.

Upon the second hearing before the Ninth District Court, judgment was rendered for the petitioner Davis, which, upon being again carried to the Supreme Court, was again reversed, and judgment rendered for the defendants. This last case is reported in 1 La. Ann., 288.

The petitioner, Davis, sued out a writ of error, and brought the case up to this court.

*It was argued by *Mr. Coxe* and *Mr. Gilpin*, for the plaintiff in error, and *Mr. Jones*, for the defendant in error. [*282]

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The counsel for the plaintiff in error contended,—

1. The plaintiff contends that the grant under which he claims originated in a contract by which the exclusive privilege of keeping a ferry in front of his plantation was given to Thomas Thompson, in consideration for making a road, which he did make.

2. That the words *con exclusion*, in the grant, mean that the sovereign or his agents shall not establish another ferry within a reasonable distance of his own.

3. That the ferry attempted to be established at Vidalia by the defendant is on the same line of travel, and in the immediate vicinity of his grant; and, if it goes into operation, the obligation of the contract which he holds will be impaired, and his benefit greatly diminished, contrary to the true intent and meaning of the grant.

Recognizing the supervising authority of this court, and yielding to the supposed exposition of law by this tribunal, the Supreme Court of Louisiana decided that the words *con exclusion* were susceptible of an interpretation different from that given to them by complainant's counsel; and therefore it was incumbent on that court to give to that expression this narrow and restricted meaning. On the part of the plaintiff in error, it will be contended that this court erred.

This case, on the same pleadings, has been twice before the Supreme Court of Louisiana; on the first occasion, reported in 19 Louisiana, 533, it came up on bill of exception taken on the trial on sundry rulings of the District Court as to the admission or rejection of testimony. The plaintiff's title was, however, then exhibited, as it now is, and sustained by the same documentary evidence which is now produced. The validity of this title was then denied by defendant, as it now is, and was then at issue. Yet, throughout the entire argument of counsel, and the opinion of the court, no doubt is breathed as to the extent of the privilege embraced in the grant. The cause was remanded, with instructions to the District Court as to the competency of testimony alone.

On the second trial, the District Court did conform to these directions, and a verdict was rendered for the plaintiff.

On a second appeal to the Supreme Court, every point which was decided in the District Court directly was affirmed; but a new point was gratuitously taken by that court, on which its decision was adverse to plaintiff; and this point is that *283] which *is alone presented on this writ of error. 1 La. Ann., 288-292.

The Louisiana court appeared to think this case closed by the *Charles River Bridge case*, in 11 Pet., 423, and under-
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stood it as asserting, "that, if any other meaning can be given to a grant besides that which would surrender for ever a franchise, and a part of the sovereign power, that meaning must be preferred." We contend that the language and meaning of this court in the case cited have been misunderstood; and that no such doctrine ought to govern the present case.

We shall further contend,—

1. That the mere grant of a ferry privilege across the Mississippi, by competent authority, implies, *ex vi termini*, an exclusion of all other ferry rights, not only by private unlicensed individuals, but operates to exclude the sovereign from making a similar grant, or one which will conflict with it, and impair or destroy its value to another.

2. That the grant in this case, *con exclusion*, is such an express recognition of such exclusive right.

3. That this is a case of express contract, by which, for a valuable consideration, Thompson became the purchaser of an exclusive ferry privilege.

4. That the uninterrupted and uncontested right thus claimed, having been exercised and enjoyed by himself, and those under whom he claims title, for a period of thirty-eight years, furnished the most conclusive evidence of title against defendants.

The authorities relied upon to sustain these positions are those referred to in the cases already cited from the Louisiana Reports, and 11 Peters; with the opinion of this court, pronounced during the present term, in the *Illinois Ferry case*,—confirming the views here taken of the *Charles River Bridge case*. *West River Bridge v. Dix*, 6 How., 507; 25 Wend. (N. Y.), 631; 12 Pet., 435; 1 How., 194; Partidas, 3, 18, 28, 37, 39, 5, 7, 20; Just. Dig., 8, 1, 20, 42, 9, 1; 1 La. Dig., 448, 476; 2 Id., 241; 2 White's New Recop., 190, 194, 516; 2 Martin's Treat., 329; 2 Stat. at L., 245, 283, 324; 8 Id., 202; La. Code of Practice, 6, 296.

The sovereignty of Spain existed in full force at the time of the grant, and the property derived under it was protected by the treaty with France. Treaty of St. Ildefonso of 1st October, 1800, 2 White's New Recop., 516. Treaty of Madrid, 21st March, 1801, 2 Martin's Treat. Sup., 329. Royal Order of Delivery, 15th October, 1802, 2 White's New Recop., 190. Treaty of Paris, 30th April, 1803, 8 Stat. at L., 202.

*The second point made by *Mr. Jones*, for the defendant in error, was as follows:—

II. The grant in question, whatever the nature or extent

of the interest intended to be conveyed by it, never, for an instant, had any validity, as against the United States or the State of Louisiana.

1st. Because it was not one of those complete and consummate grants, the validity, force, and effect of which were left by Congress to be determined by the general principles and rules of international law, but was executory in its nature, as being dependent, for its consummate force and effect, upon the performance of a condition by the grantee, and therefore within the purview of the laws of the United States making it necessary for all but consummate grants to pass through the regular process to confirmation by Congress, or to adjudication under the authority of Congress. (Laws of United States and judgments of this court in execution of them, hereinafter cited to other points, and *passim*.)

2d. Because the treaty of St. Ildefonso, as between the parties to it, operated from its date; and instantly transferred to France all the rights of municipal sovereignty and eminent domain then appertaining to the territorial sovereign; which Spain was bound to transmit undiminished and intact to France. During the time that Spain occupied the province, between the date of the treaty (1st October, 1800) and the delivery of the province over to France (30th November, 1803), the possession and the dominion, remaining with her, were held in trust for France. The authority resulting from such possession and dominion was limited to the ordinary acts of local administration, the preservation of order and the due execution of the laws, and extended not even to the granting away of royal demesnes or crown lands, far less to the irrevocable alienation of any portion of the eminent domain, or to the diminution of any of the rights of ultimate sovereignty then enjoyed by the territorial sovereign.

Even the United States are held to have taken the dominion of all the territories ceded to them, including whatever was ceded either by particular States or by France, under a strict trust for the new States intended to be carved out of such territories; and, as such trustees, bound to transmit all the rights of municipal sovereignty and eminent domain unimpaired to the new States; and were therefore incompetent to grant away from the new States any navigable waters, or the soils under them, or the shores, or, in short, any land below the ordinary high-water mark. *Pollard v. Hogan*, 3 How., 221 *et seq*.

*285] *But all question of the disabling effect of the treaty of St. Ildefonso, from its date, upon Spanish authority to grant, or in any way to diminish, either the crown

lands or any rights of territorial sovereignty, was completely closed in three months after the delivery of Louisiana to the United States, by an act of Congress positively repudiating all Spanish grants made after the 1st of October, 1800, with an exception of actual settlers before that date; and this court, conforming to the rule so repeatedly laid down in its own adjudications, which binds the judicial department to follow the lead of the political department of the government in the practical construction, assertion, and execution of all such national rights as are acquired, and of all such national obligations as are incurred, by treaty stipulation, has repeatedly adjudged Spanish grants to be void, because made after that date. Act of Congress, 26th March, 1804, erecting Louisiana into two territories, 2 Stat. at L., 283; *Foster and Elam v. Neilson*, 2 Pet., 253; *Garcia v. Lee*, 12 Pet., 515; *Pollard v. Kibbe*, 14 Pet., 63.

If, therefore, the grant now in question be taken as going to vest a perpetual and irrevocable franchise in the grantee, it bound neither France nor the United States. The utmost extent of jurisdiction then remaining in any Spanish authority over ferries, was to license and regulate them; so as that the term of no license should go beyond the duration of the temporary possession and dominion held by Spain.

Mr. Justice WAYNE delivered the opinion of the court.

There is enough upon the record of this case to give this court jurisdiction, but not enough to give the appellant the relief for which he has brought it here.

His complaint is, that the application of the law of Louisiana for the establishment of ferries (2 Mart. Dig., 142; 3 Id., 292) to a ferry franchise claimed by him, from Concordia to Natchez, is an invasion upon a right of property secured by the third article of the treaty between the United States and the Republic of France, ceding Louisiana to the former; and that it impairs the obligation of a contract, which was entered into between the Marquis de Casa Calvo and one Thomas Thompson, on the 19th of February, 1801, granting to Thompson a ferry at the post of Concordia to Natchez, as a privilege to be attached to his plantation, on condition that Thompson would clear a public road from Concordia to the Bayou Cocodrillo. The appellant claims the franchise and land to which it was attached, as a purchaser of both from Joseph Vidal, who bought from Thompson the grantee, on the 16th of October, 1803. It is *further said, that by [*286 the law, usages, and customs of Spain, in Louisiana, at the date of the grant, no other ferry could be established

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within a league above or below its locality. The interference with the franchise is said to be the establishment of another ferry by the Police Jury of Concordia, from the town of Vidalia, in that parish, to the city of Natchez. The validity of this proceeding is called in question, on the ground, as we have already said, of its being contrary to a treaty and the Constitution of the United States. Both having been decided by the highest court in Louisiana against the rights claimed, the cause is before us, under the provisions of the twenty-fifth section of the Judiciary Act of 1789.

In support of the appellant's case, his counsel urge,—1st. That the grant of a ferry privilege across the Mississippi, by competent authority, implies, *ex vi termini*, an exclusion of all other ferry rights, not only by private, unlicensed individuals, but operates to exclude the sovereign from making a similar grant to another, which will conflict with it, or impair or destroy its value. 2d. That the grant in this case, *con exclusion*, is an express recognition of such exclusive right. 3d. That this is a case of express contract, by which, for a valuable consideration, Thompson became a purchaser of an exclusive ferry privilege. 4th. That the uninterrupted right thus claimed, having been exercised and enjoyed by the appellant, and those under whom he claims, for thirty-eight years, is conclusive evidence of title against the defendants.

We have placed the point in the case upon which the jurisdiction of this court attaches in near connection with the points just read, to show that three of them are not reëxaminable by this court, however they may have been adjudicated by the court below.

The first, second, and fourth points involve questions of what the sovereign may do, or not do, in granting a second ferry franchise which impairs the value of one previously granted; also, whether the words *con exclusion*, in the grant to Thompson, mean an exclusive and perpetual ferry franchise; and, lastly, whether its long use by Thompson and those claiming from him is, or is not, conclusive proof of the franchise, and that they may claim it prescriptively. All of these are questions depending upon the provincial laws of Louisiana, when belonging either to France or Spain; upon its territorial law afterwards, when it became a part of the United States; and upon such laws as may have been passed and continue to be in force in the State of Louisiana. Neither of them involves the validity of a treaty or statute of, nor an *287] authority exercised *under, the United States; nor the validity of a statute or an authority exercised under a State, on the ground of being repugnant to the Constitution,

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treaties, or laws of the United States ; nor do they, or either of them, draw in question the construction of any clause of the Constitution, or of a treaty or statute of, or commission held under, the United States.

What we have to decide in this case is, whether or not the franchise of a ferry given by the Marquis de Casa Calvo to Thompson is a property protected by the treaty by which Louisiana was ceded to the United States, or a contract bought by Thompson for a valuable consideration, which has been impaired by the action of the Police Jury of Concordia, under the laws of Louisiana.

Now, in our view of the case, it matters not what merits Thompson may have had in getting his privilege of a ferry : whether he made, or did not make, the road from the post of Concordia to Cocodrillo ; or how long he and those claiming under him have had the use of the privilege ; or what were the powers of the Governor of Louisiana to grant such a franchise, or to what extent other officers, acting temporarily as governors, could exercise the powers of sovereignty, delegated to one who was so by commission ; or what were the usages in Louisiana, before it was ceded to the United States, in respect to ferry grants and the use of them,—if the sovereignty of Spain in Louisiana had been parted with when the Marquis de Casa Calvo gave this ferry right to Thompson. Had the Marquis, at the time it was done, supposing him to have been exercising the plenary power of a Governor of Louisiana, any official faculty to delegate to a subject of the king of Spain, as a franchise, a portion of the king's royal privilege of prerogative ?

The contract must be tested, as all others are, whether they are national or private, by the competency of the parties to make it. If that does not exist, nothing can be claimed under it, except such equities as may have arisen from either from the conduct of one or the other of them in the transaction.

The transaction in this case is, that the Marquis de Casa Calvo, Governor-General of the Province of Louisiana, granted to one Thomas Thompson, on the 19th of February, 1801, a ferry at the post of Concordia, opposite to the town of Natchez, as a privilege to be attached to the plantation he possessed, “in order that from that place, with exclusive privilege, he may carry on the ferry across the river, demanding and receiving only the prices most equitable and customary which may be established with the accord of the commandant of the post of *Concordia,”—“*que se fixavan con acuerdo del* [*288 *dicho commandante.*”

Four months before this privilege was given to Thompson,

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on the 1st of October, 1800, the treaty of St. Ildefonso was made, by which Spain retroceded to France the Province of Louisiana. The terms and conditions of that treaty we will speak of presently, as far as it may be necessary to do so, after we have shown the views taken by the different departments of the government of the United States of the obligations of it, when they began, and when the full sovereignty of Spain ceased over Louisiana.

Each of them has said officially, that the sovereignty of the king of Spain for granting lands in Louisiana ceased with the signatures of the treaty of St. Ildefonso, on the 1st of October, 1800. Within a year after the cession of Louisiana, Congress, having learned that concessions for lands had been made by the Governors of Louisiana, between the 1st of October, 1800, and the 30th of April, 1803, the date of our treaty with France, passed an act declaring all such concessions void, and of no effect in law or equity.

This act was passed coincidently with what had been the declaration of the executive department of the government. This court has said the same in several cases. In the case of the *The United States v. Joseph Reynes*, decided at this term, it has been reaffirmed, with a more extended examination than had been made before of the treaty of St. Ildefonso, that also between the French Republic and the king of Spain, signed in Madrid on the 21st of March, 1801, with the order of Barcelona for the delivery of Louisiana to France in execution of both treaties, and of the treaty between France and the United States in connection with the actual delivery of the Province to the United States, on the 20th of December, 1803, by Laussat, the commissioner of the French government appointed for that purpose. The treaty of St. Ildefonso may be found in 2 White's New Rec., 516; that of Madrid of the 21st of March, 1801, in 2 Martin's Treaties Sup., 329, and in 2 White, 501; the royal order given at Barcelona, and the proceeding thereon, in 2 White's Recop., from 190 to 196 inclusive; the treaty between France and the United States, 2 White's Recop., 196; and the act of delivery by France to the United States, 2 White's Recop., from 225 to 228 inclusive.

In *Reynes's case*, the judgment of the District Court affirming his grant was reversed, on the ground that the treaty between France and the United States gave to the latter all the rights acquired by France by the treaty of St. Ildefonso, *289] and *that the political sovereignty of the king of Spain in Louisiana to grant lands ceased with the date of it, on the 1st of October, 1800.

We will now show, that the decision in that case accords with the received usages of nations in respect to rights acquired under treaties; that it is sustained by all that we now know of what were the relations between France and Spain at the time of the event, and the motives of the two governments for entering into the treaty of St. Ildefonso.

All treaties, as well those for cessions of territory as for other purposes, are binding upon the contracting parties, unless when otherwise provided in them, from the day they are signed. The ratification of them relates back to the time of signing. Vattel, B. 4, c. 2, sec. 22. Mart. Summary, B. 8, c. 7, sec. 5.

It is true, that, in a treaty for the cession of territory, its national character continues, for all commercial purposes; but full sovereignty, for the exercise of it, does not pass to the nation to which it is transferred until actual delivery. But it is also true, that the exercise of sovereignty by the ceding country ceases, except for strictly municipal purposes, especially for granting lands. And for the same reason in both cases; because, after the treaty is made, there is not in either the union of possession and the right to the territory which must concur to give *plenum dominium et utile*. To give that, there must be the *jus in rem* and the *jus in re*, or what is called in the common law of England the *juris et seisinæ conjunctio*. "This general law of property applies to the right of territory no less than to other rights, and all writers upon the law of nations concur, that the practice and conventional law of nations have been conformable to this principle." Puffendorf par Barbeyrac, lib. 4, c. 9, sec. 8, note 2.

In this case, after the treaty was made, and until Louisiana was delivered to France, its possession continued in Spain. The right to the territory, though in France, was imperfect until ratified, but absolute by ratification from the date of the treaty. Such was the manifest intention, from the promise and engagement of his Catholic Majesty in the third article of the treaty;—conditional upon the execution of the stipulations of the treaty relative to the Duke of Parma; but becoming retroactively absolute from the time of the signature of the treaty, as soon as these conditions were performed, or when others for the same end were substituted by the contracting parties.

The disability of France, or her refusal to perform the conditions for which the retrocession was to be made, would have released the king of Spain from his promise and engagement

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*290] to *make it. It may also be, that the conditions were to be performed by France in the time mentioned in the first article, and that Spain was to keep possession of the territory as a security for that performance. But in either case, our conclusions that the rights of France attached, and that the sovereignty of Spain ceased from the signature of the treaty, would not be weakened; as the Republic of France and his Catholic Majesty entered into another treaty on the 21st of March, 1801, to determine in a positive manner what states were to be given to the infant Duke of Parma, as an equivalent for the Duchy of Parma. In which it is also declared, that this second treaty had its origin in that in which the king cedes to France the possession of Louisiana. And further, that the contracting parties agree to carry into effect the articles of that treaty, and that, while the difficulties with regard to them are in process of arrangement, the present treaty shall not destroy the rights of either party under the first treaty. And if, as has been said, possession was meant to be held by Spain, as a security for the fulfilment of the treaty by France, until the time when the delivery was to be made, that purpose must be considered as exclusive of any larger intent. The order given by Spain for the delivery of the territory to France precludes all inquiry about the performance of the stipulations of the treaties by either of the contracting parties. Its terms, as is said in *Reynes's case*, acknowledge that the right of France to the territory ceded was complete, and that the sovereignty of Spain over it ceased with the signature of the treaty of St. Ildefonso.

This view of the subject is confirmed by the subsequent conduct of Spain. When her relations with France had become less amicable than they had been, and it was rumored that France was negotiating a sale of Louisiana to the United States, the Secretary of State of Spain, Don Pedro Cevallos, wrote to our Minister, Mr. Charles Pinckney, remonstrating against the proceedings of France in disposing of Louisiana. He declared, also, if the United States bought it, that it would be an absolute nullity, as France had formally and positively engaged not to sell it. No other complaint was then or afterwards made in respect to the right of France to Louisiana, or when those rights began. 2 White's Recop., 544. Of course, as there was nothing of the kind in the treaty, the remonstrance was disregarded, and the purchase was made.

There will be found also, in the order given for the delivery of Louisiana to France, a further confirmation that the king of Spain had not his former sovereignty over it after the treaty

of St. Ildefonso was signed, and that his ministers did not think he had in the interval until the delivery was made.

*The order does not vary, except as to the thing to be done, from the usual formula, for such a purpose. [*291 It is in fact a copy of the order which was given by France when Louisiana was ceded to Spain in 1762. That had been preceded by others like it for more than a hundred years, when the monarchs of Europe ceded to each other by treaty distant territories, either in India or America. This which we are now considering must have the same meaning which international usages have uniformly given to the whole of them.

There is always, in such an order, a commendation of the inhabitants, their interests generally, and of their possessions or property, perfect and inchoate, to the kind consideration of their new monarch, in the sense in which, presumptively, they would have been treated by the ceding sovereign. The language of it is hope,—not right, or the assertion of power. If it was not so, the order for delivery might impose larger obligations upon the nation who receives the territory than the treaty does. The relations as to the value and suitability of the ceded territory for the purposes of colonization might be changed. Instead of having lands for gratuitous distribution to new colonists, or upon such terms of purchase as the policy of a new sovereign might make desirable, that policy might be controlled by grants after the treaty for a cession has been signed. Indeed, before the signature of a treaty, but after negotiations have begun for a cession of territory, grants of land cannot be made in it without being subject to confirmation by the sovereign to whom the transfer shall be made. The inceptive equity of grants made by the governors of remote territories, who do not know that a cession of it has been made, or that negotiations have been begun for such an end, may be recommended to the kind consideration of the sovereign who receives the transfer; but no more can be claimed. When, then, the king of Spain gave his order at Barcelona for the delivery of Louisiana to France, and said, in royal terms, “meanwhile we hope” that all grants of property, of whatsoever denomination, made by my governors may be confirmed, although not confirmed by myself, he admits that he had not the sovereignty to confirm them; that he had no power to do then what he might have done before the treaty, and what he ought to have done if he had power afterwards to confirm them,—that which, in fairness to his former subjects and to his own honor, it may be presumed he would have done, but from being conscious that

the power to confirm such grants had been transferred to France. Such orders for the delivery of ceded territories, though usual, are not always given, whether there is or is *292] not a provision in the *treaty for it to be done. Without them, however, treaties could not be consummated in already settled territories, with a due regard to the respective rights of the contracting parties, or with the peaceable transference meant by them. They prevent violence, are the best proof of a change of national character, preserve the commercial rights of the inhabitants, give to them in the eyes of all the world the new rights and relations they may have acquired, and establish, in the most notorious way it can be done, that the ceded territory has become a part of another dominion, partaking with it all those relations which nations can have with each other in commerce, in peace, and in war.

Sir William Scott, in his opinion in the *case of the Fama*, 5 Rob. Adm.,—given as early as February, 1804, upon the treaty of St. Ildefonso, retroceding Louisiana to France, (though the reporter cites it as of the date of the previous treaty of St. Ildefonso of 1796,)—coincides with our views respecting sovereignty over a ceded territory, and the commercial character, in which a people of a distant settlement are placed, by a treaty of the state to which they belong, and by which they are stipulated to be transferred to another power, before the delivery of the territory has been made.

The *Fama* sailed from New Orleans in April, 1803, for Havre de Grace, with Spanish property on board. She was taken on the way by a British cruiser, and her cargo libelled, it being alleged to be enemy's or French property only upon the ground that Louisiana had been ceded by Spain to France before the *Fama* sailed. The points stated in the words of Sir William Scott are, whether the treaty did not in itself confer full sovereignty and right of dominion to France, and whether the inhabitants were not so ceded by that treaty as to become immediately French subjects. The cause was fully argued on both sides by as able counsel as were in that day or since in the admiralty courts of England. The cargo was restored to the Spanish claimant, on the ground that the national character of a place agreed to be surrendered by treaty, but not actually delivered, continues as it was under the character of the ceding country.

He cites, in support of his conclusion, the treaty signed at Breda, on the 21st of July, 1667, between Louis the Fourteenth and Charles the Second, in which Nova Scotia was ceded to France; and the treaty of 1762, by which Louisiana

was ceded by France to Spain. He might have found in the proceedings under the first, before the order for delivery was given, a confirmation of his conclusion, in the orders and *passes which were given to merchant ships before the treaty was ratified. Such passes were given to renew [*298 at once the navigation and commerce provided for in the fourth article of that treaty, and that French vessels might trade with Nova Scotia as a dominion of France before it was surrendered. His whole argument, too, for his conclusion shows that, when he says, "until a delivery has been made, the former sovereignty must remain," he did not mean sovereignty in the sense of the supreme power to govern and to dispose of the lands in a ceded territory, or for the exercise of any sovereign power in it other than that sovereignty which was necessary to preserve and enforce the sanctions of its social condition, and which would protect its inhabitants in all of their existing national relations, conventional or otherwise, whatever they might be, until they were actually surrendered. When delivery has been made, these relations cease for the future from the time it has been done, and those of the nation receiving the territory begin. That such was the extent and limit of Sir William Scott's use of the words "sovereignty must remain," is clear from the concluding words upon that point in the case. They are,—“I am of opinion, therefore, that on all the several grounds of reason or practice and judicial recognition, until possession was actually taken, the inhabitants of New Orleans continued under the former sovereignty of Spain.” And when previously speaking of what passes full sovereignty in territory acquired by treaty, his test of union of possession and right to constitute full sovereignty excludes the idea of its entire continuance in a government which, having had both, had parted with its *right* to another, with a concomitant obligation to deliver the possession. In fact, the full sovereignty in such a case is not in one or the other of the contracting parties, but in both, for either to do whatever is essential to the preservation of the ability of each to consummate their contract, according to its terms.

Of course, what we have just said respecting sovereignty in cessions of territory is meant to be understood of treaties signed by plenipotentiaries having full powers to do so, and which have been afterwards ratified; and not of those conventions entered into and signed conditionally, *sub spe rati*, by a minister not furnished with orders to execute it absolutely. Such was the treaty of Fontainebleau, executed on the 3d of November, 1762, for the cession of Louisiana to Spain, which

is cited in the opinion of Sir William Scott in the case of the *Fama*. In such a case nothing passes until acceptance of it by the king to whom the cession has been offered. And not *294] *then when it is as was the case in that instance; the cession of Louisiana having been promised by preliminary articles only, which were to be followed by a convention stipulating the measures, and the time to be fixed by common accord for the execution of the first.

We have thus shown, that the conclusion to which this court came in *Reynes's* case respecting grants of land in Louisiana, after the treaty of St. Ildefonso had been signed, is in harmony with the usages and law of nations. They would have required it, if the documents attending the transaction had not led to the same result. It has been shown before, that the legislation of Congress would not permit a different conclusion. The executive department of the government has uniformly acted under the same impression.

Finally, all of our proceedings respecting Louisiana have been done upon the principle, that the law of nations does not recognize in a nation ceding a territory the continuance of supreme power over it after the treaty has been signed, or any other exercise of sovereignty than that which is necessary for social order and for commercial purposes, and to keep the cession in an unaltered value, until a delivery of it has been made. Such being the extent of sovereignty under such circumstances, is not the grant of a perpetual ferry franchise attached to land as much prohibited as a grant of land?

We cannot distinguish between them, as to the source from which they can only be made. They are only distinguishable from each other in this, that one of them is exclusively for the grantee, and the other for the use of the public, with a compensatory right of toll attached. If a ferry franchise could be given in such a case, every other franchise might be. When the extent of Spanish royal prerogative in respect to franchises is considered, and especially such as the king of Spain could give in his foreign dominions under the Roman civil law, without any modification of it in the *Partidas*, it will not be forgotten, that natural persons and bodies corporate might have been invested with monopolizing privileges and exemptions, both on the land and the water,—that charters could have been given to places, with licenses and exemptions which might have interfered seriously with the policy and institutions of a state coming into the possession of ceded territory. We will not mention them in detail. Enough has been said to show, that, if such a sov-

ereignty could be exercised after a treaty has been signed, it would be a power to change materially the relations which the people of a ceded territory had to each other; and to establish between them and a new *sovereign a different condition than had been contemplated when they [295 were transferred.

Such being the law of this case, we must say that the appellant, under the privilege of a ferry right given by the Marquis de Casa Calvo, had no property in it secured by the third article of the treaty by which Louisiana was ceded to the United States, and that no contract arose from it, the obligation of which has been impaired either by the legislation of Louisiana, or the action of the Police Jury of Concordia, under it.

We will remark further, that nothing can be inferred from what we have said in favor of the validity of any franchise relating to the navigation of the Mississippi, if any such was granted whilst Louisiana was a province, either of France or Spain.

We will not enter minutely into the history of the retrocession of Louisiana to France, or into that attending our acquisition of it. There is much in both to confirm the views we have expressed concerning national rights arising under treaties signed, and afterwards ratified. We have now, too, other sources of information, contemporary with the transaction, which disclose more fully than was known until within a few years the policy of the First Consul in acquiring Louisiana. Stimulated by the European desire for colonies, and to counteract the impressions which might be made upon his popularity, and the glory he had given to France, if Egypt should be lost and St. Domingo should become valueless from the revolt of its slaves, he determined to avail himself of his power to gratify the wishes of the king and queen of Spain, by making the infant Duke of Parma a king in and over a part of Italy, with all royal rights and honors, and to get Louisiana in return. He meant to make it a permanent colony of France. He negotiated, as the treaties show, for an absolute retrocession of its people and territory, without other limitation than that which the law of nations secured to the former. It was to belong to France as it had been, when the generous weakness of Louis the Fifteenth, without either cause or consideration, ceded it to Spain. On the other hand, that portion of Italy which was to be given for it was to be an unconditional transfer of people and territory, which, in the event of the failure of the issue of its new king, were to become absolutely a part of the

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Spanish monarchy. Neither contemplated any thing else, or that Spain should exercise a complete dominion in Louisiana, after having signed a treaty to cede it. There is not in the diplomacy of nations a more absolute surrender of dominion, *296] than was made *by the king of Spain in the treaty of St. Ildefonso of October, 1800.

From that time until the treaty of Amiens was made, and afterwards, when it was foreseen it would be but a short truce, and would be followed by wars of longer duration, and greater changes in the condition of European nations than had been made in the wars of the ten preceding years, the First Consul, amidst all of his grand contemplations, did not lose sight for a moment of the colonization of Louisiana. Troops were embarked to take possession of it. Plans were made to colonize it exclusively with Frenchmen. He saw what might become our pressure upon it from the West, and to guard against the chances of war, which were then in this hemisphere in favor of England, it was to have been in its beginning a military colony under a leader of marked character and renown. France looked for commercial advantages from it, and a commanding war position over the Gulf of Mexico. It was hoped, too, that it would give to France, in the foreseen wars of Europe, favorable influences over the United States. That such a power as France, between the United States and Mexico, would check us in our career in that direction, and would give to France the control of Mexico, and the continuance of her control over Spain itself. It was not in the order of Providence, that such intentions should be accomplished. The First Consul foresaw a war, in which all the resources of France would be wanted, and all that could be gathered from every source. The war came sooner than he anticipated, or meant that it should. It deprived him of all certain ability to take possession, or to retain Louisiana if he had done so. The navy of England was in his way. With his usual decision, and in opposition to his counsellors, he determined to sell Louisiana to the United States, when we were then only negotiating for such a part of it as would secure to us the transit of our Western produce to the ocean. Our ministers, with promptitude never to be forgotten, without orders or powers from home to do so, secured the prize by the treaty of the 30th of April, 1803.

We shall direct this cause to be remanded for such further proceedings in the court from which it has been brought as that court may deem necessary.

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ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the *said Supreme Court in this cause be, and the [*297 same is hereby, affirmed, with costs, and that this [*297 cause be, and the same is hereby, remanded for such further proceedings as the said Supreme Court may deem necessary.

BENJAMIN G. HUMPHREYS, APPELLANT, v. LEGGETT,
SMITH, AND LAWRENCE.

The laws of Mississippi limit the liability of the sureties in the official bond of a sheriff to the amount of the penalty.

Where the surety had been compelled to pay the whole amount of his bond before a third party recovered judgment, the surety ought to have been relieved against an execution by this third party.

Not having been allowed to plead *puis darrein continuance*, and protect himself in this way by showing that he had paid the full amount of his bond, the surety ought to have been relieved in equity where he had filed a bill for relief.¹

THIS was an appeal from the Circuit court of the United States for the Southern District of Mississippi. It arose from a former case in this court, *McNutt v. Bland et al.*, reported in 2 How., 9.²

The facts were these.

On the 6th of November, 1837, Richard J. Bland was elected sheriff of the County of Claiborne, in the State of Mississippi, for the term of two years, prescribed in the constitution of that State.

On the 10th of November, 1837, Richard J. Bland, Benjamin G. Humphreys, and John Grissom, all of that county and State, executed a penal bond, in the sum of \$15,000, to Charles Lynch, Governor of the State, conditioned for the faithful execution by Bland of the duties of his office.

On the 30th of December, 1837, a writ of *capias ad satisfaciendum* was issued, at the suit of Leggett, Smith, and Lawrence, on a judgment obtained by them, as they allege, in the Circuit Court of the United States for Mississippi, against

¹ EXPLAINED. *The Elmira*, 16 Fed. Rep., 138. CITED. *Crim v. Handley*, 4 Otto, 668.

² Further decision, 21 How., 66.

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George W. McNider, for \$3,910.78, on the 17th of November, 1837; and the said writ was placed in the hands of the Marshal of the United States for Mississippi, who took McNider into custody by virtue thereof, and delivered him for safe-keeping to Bland, as the sheriff of Claiborne County.

On the 12th of December, 1838, an execution was issued, at the suit of the Planters' Bank of Mississippi, on a judgment obtained by the bank in the Circuit Court of Mississippi for Claiborne County, against Hoopes, Moore, and Carpenter, *298] for \$10,524.44, on the 4th of December, 1838, and the said execution was placed in the hands of Bland, as the sheriff of Claiborne County.

On the 21st of January, 1839, an execution was issued, at the suit of the Planter's Bank of Mississippi, on a judgment obtained by the bank in the Circuit Court of Mississippi for Claiborne County, against Campbell, Pierson, and Moore, for \$3,718.78, on the 29th of November, 1836, and the said execution was placed in the hands of Bland, as the sheriff of Claiborne County.

On the 28th of March, 1839, a suit was instituted and declaration filed in the Circuit Court of the United States for Mississippi, in the name of Alexander G. McNutt, Governor of the State of Mississippi, to the use of Leggett, Smith, and Lawrence, against Bland, Humphreys, and Grissom, to recover damages for an alleged breach by Bland of his official bond, in setting McNider at liberty without lawful authority, while their judgment was in full force against him and unsatisfied.

On the same day a summons, in that suit, was issued against Bland, Humphreys, and Grissom, to which the marshal made return,—“Executed on R. J. Bland, personally, on the 5th April, 1839”; no return being made as to Humphreys and Grissom.

On the 20th of June, 1839, an alias summons, in the same suit, was issued against the same persons, with directions to be executed on Humphreys and Grissom only, to which the marshal made return,—“Executed this writ on B. G. Humphreys, personally, on the 14th day of October, 1839; J. Grissom not found in my district. [Signed] W. M. Gwin, Marshal, per John Hunter, D. M.”

At November term, 1839, a plea was filed in the names of the defendants, Bland and Humphreys, in the same suit, denying the plaintiff's right of action, because Leggett, Smith, and Lawrence had failed to comply, in their proceedings against McNider, with the act of Mississippi, which required them to pay or give security for jail fees, and to appoint an agent in

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the county of Claiborne to receive notice of matters touching the execution, in default of which the prisoner was to be discharged; and further, because, after his commitment, he was regularly discharged therefrom, by a warrant from the judge of probate, under the insolvent laws of the State of Mississippi.

At the same term a replication was filed by Leggett, Smith, and Lawrence, alleging that they had an agent in the County of Warren; that no application was made to them for jail fees, or security therefor; that no notice was given to them of any *intention or application to discharge McNider; and, [299 further, that McNider, being in custody under process from the Circuit Court of the United States, was not legally discharged.

At the same term a demurrer to this replication was filed, in the names of the defendants.

On the 26th of November, 1839, a discontinuance was ordered, as to the defendant Grissom; the demurrer on behalf of the other defendants was sustained; and judgment was entered in their favor, with costs.

On the 28th of November, 1839, a writ of error to the Supreme Court of the United States was issued by the clerk of the Circuit Court of Mississippi, at the suit of Leggett, Smith, and Lawrence.

On the same day a citation, addressed to "Richard Bland and Benjamin G. Humphreys, or Messrs. Winchester, Black, & Chaplain, Attorneys of Record," was issued, signed by "S. J. Gholson," one of the judges of the Circuit Court.

On the 20th of May, 1840, a motion was made in the Circuit Court of Claiborne County, Mississippi, on behalf of the Planters' Bank of Mississippi, for a judgment against Bland, as sheriff, and Humphreys and Grissom, as his securities, on the allegation that Bland had failed to return the execution issued at the suit of the bank against Hoopes, Moore, and Carpenter, and the judgment was granted for the sum of \$11,775, with \$526.22 damages.

On the 25th of May, 1840, a similar motion was made in the same court, on behalf of the same bank, against the same defendants, on the allegation that Bland had failed to return the execution issued at the suit of the bank against Campbell, Pierson, and Moore, and the judgment was granted against Bland and Humphreys for \$2,674.75, "the balance," it was stated, "of the said official bond" of Bland.

On the 16th of July, 1840, writs of *feri facias*, under each of these judgments, were delivered to the coroner against Bland and Humphreys; that in the first case being indorsed,

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"No security of any kind is to be taken." Under these writs, the estate, real and personal, of Humphreys was levied upon and sold; and the sum of \$15,160.39, the proceeds thereof, was paid over by the coroner to the Planters' Bank.

On the 11th of December, 1840, the record in the case of McNutt to the use of Leggett, Smith, and Lawrence, against Bland and Humphreys, was brought into the Supreme Court of the United States, from the Circuit Court of the United States for Mississippi (January term, 1841, No. 43). It consists only of the record of the Circuit Court in the case of *300] **Leggett, Smith, and Lawrence v. Bland and Humphreys*, together with the writ of error and citation. The citation is indorsed, "Service on the defendants, accepted, Nov. 28, 1839. Geo. Winchester, for defendants."

The appearance is general,—for defendants,—“Walker.”

Nothing appears to have been done at that term with the case.

At January term, 1842, the case was reached, and ordered to the foot of the docket.

At January term, 1843, on motion of Mr. Jones, for the plaintiff in error, the court granted leave to submit it on printed arguments.

At January term, 1844, the case was argued.

On the 30th of January, 1844, it was adjudged to be reversed, with costs, and remanded, with directions to enter judgment for the plaintiff.

On the 31st of January, 1844, Mr. Jones suggested the death of R. J. Bland, and moved that the writ of error stand against the survivor.

On the 12th of March, 1844, it was ordered that the mandate should direct judgment to be entered against the survivor. See 2 Howard, 28.

On the 1st of —, 1844, a mandate was issued reciting the judgment; and also that, “whereas in the present term of January, 1844, the death of Richard J. Bland having been suggested, it was ordered by this court that this cause stand against Benjamin G. Humphreys alone, as the survivor”; on consideration thereof, it was “ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs, and that the said plaintiff recover against the said defendant, Benjamin G. Humphreys, \$64.85, for his costs therein expended, and have execution therefor”; and it was further “ordered and adjudged that this cause be, and the same is hereby, remanded to the said Circuit Court with directions to

that court to enter judgment for the plaintiff, against Benjamin G. Humphreys alone, as the survivor."

On the 2d of November, 1844, the mandate of the Supreme Court having been filed in the Circuit Court of the United States in Mississippi, the defendant, Humphreys, asked leave to file a plea, *puis darrein continuance*, in which he set forth the judgments obtained against him in the Circuit Court of Claiborne County, on account of the failure of Bland to execute the writs in the cases of the *Planters' Bank v. Hoopes, Moore, and Carpenter*, and the *Planters' Bank v. Campbell, Pierson, and Moore*; and his own payment thereof, to the full amount *of his bond, as surety for Bland under executions issued by virtue of those judgments. The court, [*301 however, refused to admit the plea, on the ground that it was not competent for it to do anything in that action but obey the mandate of the Supreme Court.

On the 17th of May, 1845, Humphreys filed a bill in equity, in the Circuit Court of the United States in Mississippi, against Leggett, Smith, and Lawrence, exhibiting the foregoing facts; and further averring, that, from the commencement of the suit in the Circuit Court by Leggett, Smith, and Lawrence, in the name of McNutt, as Governor of Mississippi, on the official bond of Bland, until the judgment of reversal by the Supreme Court of the United States, he had no notice or knowledge whatever thereof, or of the proceedings therein; that no process was ever served, or, to his knowledge, attempted to be served, on him; that although the deputy marshal makes return to the summons, that it was "executed on B. G. Humphreys, personally, on the 14th day of October, 1839," this is absolutely untrue; that he can prove that the return was so made, at the instance of Bland, who wished the fact of the suit to be kept a secret from him, Humphreys; and that he never employed counsel, and never authorized any person to enter an appearance for him. He, therefore, prayed for an injunction to restrain proceedings at law under the judgment; and, upon final hearing, that the injunction might be made perpetual.

On the 8th of July, 1845, Humphreys gave bond in the sum of \$12,880.12, and the injunction issued.

On the 11th of November, 1845, Leggett, Smith, and Lawrence filed a general demurrer to the bill, as exhibiting no case for equitable relief.

On the 17th of November, 1846, judgment was given on the demurrer against the complainant, Humphreys, and a decree entered dismissing his bill.

On the same day, the appeal was prayed for, and allowed.

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The cause was argued by *Mr. Gilpin*, for the appellant, and *Mr. Jones*, for the appellees.

Mr. Gilpin, for the appellant, contended that this decree was erroneous, and ought to be reversed.

It appears by the foregoing statement of the facts, that, on the 16th of July, 1840, Humphreys paid, under executions issued upon judgments obtained against him on this bond, the whole penalty thereof. If, therefore, the present appellees are not restrained from proceeding to execution against him, upon the judgment they have subsequently obtained on the *302] same *bond, he will be compelled to pay the penalty thereof a second time.

The questions, therefore, to be considered, are, whether he was legally bound to pay under the executions issued against him on the 16th of July, 1840; whether, notwithstanding such payment, the appellees can compel him also to pay the amount of the judgment they have obtained; and whether he is entitled to the protection of a court of equity, against such compulsory payment, in the manner prayed for in his bill.

I. The appellant, Humphreys, was compelled by law to pay the whole amount of the penalty of his bond; it was done by the sale, under execution, of his property, real and personal,—even his household furniture; he could not delay the payment even by giving security. The law of Mississippi, under which his bond was given, and by the provisions of which law his liability as security of the sheriff is regulated, compelled the payment under the judgments obtained by the Planters' Bank of Mississippi, on the 20th and 25th of May, 1840, and the executions issued thereon, amounting to more than \$15,000, the penalty of the bond.

“If any sheriff, under-sheriff, coroner, or other officer, shall collect, by virtue of an execution or executions, a part or the whole amount of money due by such execution or executions, such sheriff, under-sheriff, coroner, or other officer, shall, immediately after the collection of any such sum or sums of money, pay the same over to the plaintiff in the execution, or his attorney, provided that the plaintiff or his attorney shall demand the same; and on failure to pay the same at the time of demand made, such sheriff, under-sheriff, coroner, or other officer, his and their sureties, shall be liable to pay to the plaintiff in the execution the whole amount of money so collected, together with twenty-five per cent. damages thereon, with interest at the rate of eight per cent. per annum; to be recovered by motion before the court to which such execution

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is made returnable, after reasonable notice to such sheriff or other officer of such motion; and the clerk of the court before which such motion is made shall indorse on the execution issuing on the judgment against such sheriff, coroner, or other officer, and their securities, that 'no security of any kind shall be taken.' Provided always, that if any sheriff shall have more executions than one in his hands, and shall have failed to make a sufficiency of money to satisfy the whole amount of the several executions, and shall file an affidavit of the fact with the clerk of the Circuit Court of the proper county, such sheriff shall not be liable to the penalties hereby prescribed."

*" All sheriffs shall be liable, in the manner above prescribed, for moneys collected by their deputies on [*303 executions, whether the same shall have come to the hands of the sheriff or not."

" If any sheriff, coroner, or other officer, shall fail to return any execution to him or them directed, on the return day thereof, the plaintiff in the execution may recover judgment against such sheriff, coroner, or other officer, and his and their sureties, for the amount of such executions, with five per cent. damages, by motion before the court to which execution is returnable, with eight per cent. interest on the same until paid; and the clerk shall indorse on the execution issuing on such judgment, that no security is to be taken. Provided that, after any sheriff, coroner, or other officer shall have paid the amount of money and damages received as aforesaid, then the original execution shall be vested in such sheriff, coroner, or other officer, for his or their benefit; and provided, also, that nothing in this section contained shall be so construed as to affect the remedy already existing against sheriffs, or other officers, for failing to return executions." How. & Hutch. Miss. Dig., p. 296, § 25; Hutch. Miss. Code, p. 447, art. 7 § 1.

The facts stated, shown in the record, and admitted by the demurrer, bring within the stringent provisions of this law the liability of the appellant, as security of the sheriff.

On the 12th of December, 1838, and on the 21st of January, 1839, executions had come into the hands of the sheriff returnable to the next term of the court; at this time, no suit had been instituted by the appellees against the sheriff or his sureties, on their official bond, on the ground of the alleged escape of McNider; these executions not being returned, judgments were recovered against the appellant, on his official bond, on summary motion, and in exact accordance with the law; executions were thereon issued to the coroner against the appellant; it was therein ordered that "no security of

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any kind was to be taken"; no other executions were then in the coroner's hands against the appellant; under these executions, the entire penalty of the official bond was compulsorily made, by the sale of the property of the surety.

The first position, then, is established in law and in fact, that the appellant was legally obliged to pay, and did actually pay, under the writs delivered to the coroner on the 16th of July, 1840, the whole penalty of the bond, to recover which the present action was also brought by the appellees.

II. Are the appellees then entitled, under their judgment subsequently recovered against Humphreys, on the same bond, to issue an execution and levy its amount on his property?

*304] *They are not (even if their judgment in this action were a legal and perfect judgment, which it is not), because the penalty of the bond has already been paid, and the obligation of Humphreys is discharged; because the Planters' Bank, being the first execution creditors, were entitled to be first paid; and because it was the neglect of the appellees themselves, not to proceed in the same summary manner to recover their debt, as they were enabled to do by the law of Mississippi.

1. The law of Mississippi limits the liability of the surety to the amount of the penalty of his bond.

"The sheriff's bond shall not be void on the first recovery, but may be put in suit and prosecuted from time to time, at the costs and charges of any party injured, until the whole amount of the penalty thereof be recovered." Hutch. Miss. Code, p. 441, art. 3, § 1.

"In all actions which shall be brought upon any bond or bonds for the payment of money, wherein the plaintiff shall recover, judgment shall be entered for the penalty of such bond, to be discharged by the payment of the principal and the interest due thereon, and the costs of suit." Howard and Hutch. Dig., p. 614, § 3; Hutchinson's Miss. Code, p. 874, § 56.

And the same principle has been repeatedly affirmed by judicial decisions. *McGill v. U. States Bank*, 12 Wheat., 511; *Harris v. Clapp*, 1 Mass., 308; *State v. Wayman*, 2 Gill & J. (Md.), 279; *Glidewell v. McGaughey*, 2 Blackf. (Ind.), 361.

2. It was not possible for the appellant, Humphreys, to avoid the payment under the execution of the Planters' Bank; no security or stay of any kind was allowed; if the appellees, as plaintiffs and judgment creditors, had acquired rights, they were rights to be enforced against the fund made by the execution, or as a prior lien on the property levied

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on; if their suit or judgment gave them priority, it could not prevent the levy and sale, under this execution, but must look for its enforcement to the property sold, the money made, or the officer who wrongfully appropriated it; the obligation of the surety, Humphreys, was not the less discharged.

By the statutes of Mississippi, a judgment is a lien on all the defendant's property, personal as well as real, from the time it is entered. "In all cases, the property of the defendant shall be bound and liable to any judgment that may be entered up, from the time of entering such judgment." Howard & Hutch. Dig., p. 621, § 43; Hutchinson's Miss. Code, p. 881, § 12.

By repeated decisions, the execution creditor is entitled to the proceeds of the sale, the prior judgment creditor, who has not levied an execution, being left to his lien on the property. **Robinson v. Green*, 6 How. (Miss.), 223; [*305 *Commercial Bank v. Yazoo*, Id., 535; *Goode v. Mason*, Id., 547; *Andrews v. Doe*, Id., 562; *Bibb v. Jones*, 7 Id., 400.

3. The statute of Mississippi gave to the appellees the same summary mode of proceeding against the sheriff and his sureties on the escape of McNider, when in custody under their *ca. sa.*; if resorted to, notice would have been given to the surety, Humphreys, and his property would have been applied to their judgment; their neglect has been the cause of his property being applied, in his ignorance of any prior claim, to another debt.

"If any sheriff, under-sheriff, or other officer, shall make return upon any writ of *capias ad satisfaciendum*, or attachment for not performing a decree in chancery, for payment of any sum of money, that he hath taken the body or bodies of the defendant or defendants, and hath the same ready to satisfy the money in such writ mentioned, and shall have actually received such money of the defendant or defendants, or suffered him, her, or them to escape, with the consent of such sheriff, under-sheriff, or other officer, and shall not immediately pay such money to the party to whom the same is payable, or his attorney, or shall make any other return upon any such execution as will show that such sheriff, under-sheriff, or other officer, hath voluntarily, and without authority, omitted to levy the same, or as would entitle the plaintiff to recover from such sheriff, or other officer, by action of debt, the debt, damages, or costs in such execution mentioned, and such sheriff or other officer shall not immediately pay the same to the party to whom it is payable, or to his attorney, it shall and may be lawful, in either of the

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said cases, for the creditor at whose suit such *ca. sa.* or attachment shall issue, upon motion made before the court from which such writ issued, to demand judgment against such sheriff, under-sheriff, or other officer, and the sureties of either of them and their legal representatives jointly, for the money mentioned in such writ, with interest thereon at the rate of thirty per cent. per annum from the return day of the execution." How. & Hutch. Dig., p. 642, § 42; Hutch. Miss. Code, p. 905, § 49.

Viewed, therefore, in every light, the obligation of the appellee, Humphreys, under his official bond, has been discharged; it has been discharged involuntarily, by force of law; if the appellants lose a recourse to his personal security, they yet retain it, if their judgment be valid, against his property which was levied on; or, if they do not so retain it, their loss has arisen from their own failure to resort to remedies and *modes of proceeding which the statutes of *306] Mississippi gave them.

III. But if this were not so,—if the appellant, Humphreys, would be liable to an execution on such a judgment, legally recovered against him as a surety on this bond,—still, in this case, the appellees, as judgment creditors, are not entitled to it, because the judgment they have entered against Humphreys, if even it be not illegal in form and substance, was without any notice to him, was obtained by fraud practised against him, and is altogether such a proceeding as a court of equity will protect an innocent party from the consequences of, if sought to be carried into operation against him, by the forms of law.

1. So far as appears by the record, it is a general judgment entered in the Circuit Court against Humphreys for the sum of \$6,355.33, founded on the mandate of the Supreme Court, which merely reversed the previous judgment of the Circuit Court rendered on demurrer, and in favor of the defendant. All for which the appellees, being plaintiffs in that suit, were entitled to judgment, was the amount of damages they had sustained; and that amount should appear to be ascertained in due course of law. This the record nowhere exhibits; it exhibits merely a *ca. sa.* against McNider, reciting a judgment held by the appellees against him for \$3,910.78. That such a judgment cannot sustain an execution, is a proposition too well settled to require argument or authority for its support. Besides, it is clearly established by the statutes of Mississippi, under which the liability of the appellant, Humphreys, accrues, and by the provisions of which its extent is to be ascertained.

"If the plaintiff in any suit or action shall demur to the plea of the defendant, and the demurrer be sustained on joinder and argument, the judgment of the court shall be *respondeat ouster*; but in such case the defendant shall be compelled to plead to the merits of the suit or action, and the plaintiff shall not thereby be delayed of his trial." How. & Hutch. Dig., p. 616, § 8; Hutch. Miss. Code, p. 875, § 66.

"Every sheriff [failing to execute his duty] shall be liable to the action of the party injured by such default for all damages which he or they may have sustained thereby." How. & Hutch. Dig., p. 292, § 7; Hutch. Miss. Code, p. 443, § 7.

"Where any sheriff or other officer shall have taken the body of any debtor in execution, and shall wilfully and negligently suffer such debtor to escape, the person suing out such execution, his executors or administrators, shall and may have and maintain an action of debt against such sheriff or other officer, *his executors or administrators, for [*307 the recovery of all such sums of money as are mentioned in the said execution, and damages for detaining the same." How. & Hutch. Dig., p. 649, § 61; Hutch. Miss. Code, p. 549, § 3.

2. But the judgment itself is totally invalid, as against the appellant, Humphreys. It was obtained without notice to him; without opportunity for defence; by a deliberate fraud practised towards him; and, if followed by execution, must involve him in great and irremediable loss.

The record shows, and the demurrer expressly admits, that, in the action which has resulted in this judgment, Humphreys never had any notice of the suit till the return of the mandate from the Supreme Court; never was served with process, directly or indirectly; and never authorized any one to appear for him. Under a judgment so obtained, no execution can legally issue against him.

Personal notice to the defendant is indispensable to sustain the validity of a judgment, and to authorize subsequent proceedings under it. *Mahew v. Thatcher*, 6 Wheat., 130; *Breedlove v. Nicolet*, 7 Pet., 434; *Haydel v. Girod*, 10 Pet., 285; *Kilborn v. Woodnorth*, 5 Johns. (N. Y.), 41; *Robinson v. Ward*, 8 Id., 90; *Borden v. Fitch*, 15 Id., 143; *Kinderhook v. Claw*, Id., 538; *Corliss v. Corliss*, 8 Vt., 389; *Chase v. Hathaway*, 14 Mass., 224.

Nor is the necessity of such notice obviated by an entry of his appearance on the record, or by the appearance of attorney for him without his knowledge or authority. *Starbuck v. Murray*, 5 Wend. (N. Y.), 161; *Holbrook v. Murray*, 5 Id.,

162; *Shumway v. Stillman*, 6 Id., 449; *Aldrich v. Kinney*, 4 Conn., 382; *Bonney v. Baldwin*, 3 Mo., 49.

It is no answer to this to say, that the appellant, Humphreys, is precluded from alleging want of notice by the return of the deputy marshal to the summons, in the words,—“Executed this writ on B. G. Humphreys, personally, on the 14th day of October, 1839; (signed) W. M. Gwin, Marshal, per Jno. Hunter, D. M.” Because, in any event, the return could only be held to be evidence, not liable to contradiction by the appellant, of such execution, service, and notice; it could only be held to be such sufficient evidence as was necessary to entitle the plaintiffs to judgment in that suit. But here the demurrer admits the fact of service and notice to be otherwise; and it is not controverted in the suit, of which alone it forms part of the record. In a different suit; for different objects; in a different tribunal.

But this return would not be evidence of notice or service *308] *even in that suit; because it would be merely *primâ facie* evidence, and it has been disproved; because it does not appear that the execution was made according to law; and because there is no proof that the officer who executed it had legal authority to do so.

The return is only *primâ facie* proof of the fact it asserts. 7 Com. Dig., 287, *Return*, G; *Jones v. Commer. Bank*, 5 How. (Miss.), 43; *Williams v. Crutcher*, 5 Id., 71; *Anderson v. Carlisle*, 7 Id., 412; *Patterson v. Denton*, 1 Sm. & M. (Miss.) Ch., 595; *Boynton v. Willard*, 10 Pick. (Mass.), 170; *Butts v. Francis*, 4 Conn., 424; *Watson v. Watson*, 6 Conn., 337; *Waterhouse v. Gibson*, 4 Me., 234. And the fact asserted in it is admitted to be untrue.

The return does not show the writ was executed by leaving a copy with the person served, which is absolutely required by law,—a defect in the return fatal to it, even as *primâ facie* evidence. How. & Hutch. Dig., p. 577, § 5, p. 583, § 27; Hutch. Miss. Code, p. 835, § 22; *Smith v. Cohea*, 3 How. (Miss.), 35, 39; *Fatheree v. Long*, 5 Id., 661; *Eskridge v. Jones*, 1 Sm. & M. (Miss.), 596.

Nor is there any proof that the execution of the writ (if made) was by a legally constituted deputy; if not, it was absolutely void; that it was is not to be presumed in a case like this,—it must be proved. How. & Hutch. Dig., p. 292, § 6; Hutch. Miss. Code, p. 443, § 6.

IV. It has been established, then, that the appellant, Humphreys, has already legally and compulsorily paid the whole penalty of the bond, on which the judgment of the appellee is founded.

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It has also been established, that the judgment so obtained does not legally authorize an execution against his property.

It has also been established, that the judgment was obtained without notice to him, and by fraud practised against him.

It is proved by the record, and admitted by the demurrer, that the appellant came to the knowledge of these facts only since the mandate transmitted from the Supreme Court to the Circuit Court; that he was guilty of no laches; that he prayed and was refused leave to plead them in the action at law; that the appellees have been decreed by the Circuit Court to be entitled to issue an execution against him; and that such execution is about so to issue.

By the settled principles of equity he is entitled, in this state of facts, to the interposition of a court of equity, and to the perpetual injunction and relief prayed for in his bill. 2 Story, Equity, §§ 887, 894; Fonblanque, Equity, 6, 2, §§ 1, 2; **Marine Ins. Co. v. Hodgson*, 5 Cranch, 100; 6 Id., [*309 206; 7 Id., 332; *Lansing v. Eddy*, 1 Johns. (N. Y.) Ch., 51; *Simpson v. Hart*, Id., 98; *Hawley v. Mancius*, 7 Id., 182; *King v. Baldwin*, 17 Johns. (N. Y.), 387; *Blount v. Green*, 3 Hayw. (N. C.), 89; *Winchester v. Jackson*, 3 Id., 305; *Click v. Gillespie*, 4 Id., 8; *Goodrich v. Brown*, 1 Ch. Cas., 49; *Barnsley v. Powell*, 1 Ves. Sr., 299; *Jarvis v. Chandler*, 1 Turn. & Russ., 319; *Johnson v. Harvey*, 4 Mass., 483; *Lovejoy v. Webber*, 10 Mass., 103.

Mr. Jones, for the appellees.

The appellees present the following summary of the grounds upon which they hold the decree rendered in the court below irreversible.

The bill, being framed in palpable violation of the fortieth, forty-first, and forty-second rules of this court, was liable to dismissal, with or without demurrer, upon motion, or demurrer, *ore tenus*, at the bar; and, being already dismissed on demurrer, should stand dismissed, whatever title to relief in equity might have arisen from its allegations, had they been brought out in an admissible and competent bill.

The reversal of the decree would, of course, be followed by a mandate to the court below, calling for an answer from the defendants; when it is plain they can put in no answer that would not come within the danger of impertinence denounced in the fortieth rule.

But, waiving all exceptions to the frame of the bill, the facts alleged in it lay no foundation for equitable interfer-

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ence to set aside the judgment recovered at law by the appellees.

1st. Because the appellant, from conclusive evidence of his own showing, appears to have lost the benefit of his defence, if he ever had one that was available at law, by his own fault and negligence, continued down to the time of the rendition of the judgment against him in this court (2 How., 28), and during all the residue of that term, when he might, if he could have shown any ground of defence at once available and just, have moved the court to remand the cause, with instructions to permit him to plead *de novo*, as was done in *Lloyd v. Scott*, 4 Pet., 231.

2d. Because, if the facts alleged by him were true, they lay no ground for the interference of equity to restrain the appellees from using and enforcing their judgment at law.

3d. Because he never had any available defence at law; such as he pretends being inadmissible either at law or equity.

This court has gone far to systematize the rules which should limit the interference of equity to restrain parties *310] from *using and enforcing judgments at law, upon the ground of having failed to avail themselves of some legal defence; a branch of equity jurisprudence about which rather loose notions had prevailed, and no consistent course of procedure had been followed.

The concurrence and the clear proof of the following circumstances are held indispensable:—1st. That the party seeking such relief really had a defence that was at once just in itself, and available at law. 2d. That he lost the advantage of it by accident, surprise, or fraud, unmixed with any fault or negligence in himself or his agents. 3d. That the circumstances of such accident, surprise, or fraud affected the opposite party so far as to make it obviously against conscience for him to use and enforce his judgment. *Mar. Ins. Co. v. Hodyson*, 7 Cranch, 336, 338; *Brown v. Swann*, 10 Pet., 504–506; *Truly v. Wanzer*, 5 How., 141.

The proximate cause of the accident by which the appellant pretends to have been ousted of his just defence is collusion between Bland, his co-obligor and co-defendant, and the sheriff; by which the sheriff undertook to make a false and fraudulent return of the alias writ of summons.

To which we answer,—

1st. That there is nothing in all this to make it against conscience for the appellees to execute their judgment: if the appellant has been wronged by this misdemeanour in office, and innocent of all privity to it, it was no less a fraud upon

the appellees and upon the law; and the appellees, certainly, were no less innocent of all privity. The equities being equal, a court of equity cannot shift the burden from the one to the other; but must leave each undisturbed in his legal rights.

2d. But, in truth, the appellant was, in no sort, injured by the alleged collusion and fraud between Bland and the sheriff; every defence that the nature of the case admitted was taken, and urged with all practicable effect. As to the defence, of the loss of which alone he complains, it was no defence to that action; but belonged to the other suits on the same bond in the Circuit Court of Claiborne County. So, if the misdemeanour of the sheriff laid any foundation for relief in equity, it was against the judgments recovered in that court, not against the judgment recovered by the appellees.

3d. That the sheriff's return is absolutely conclusive on the parties to the suit; and, as between them, the truth of it cannot be drawn in question in any form of procedure at law or equity.

This is the very first case, we believe, in which it was ever *attempted by bill in equity; but in the courts of law [*311 it has been frequently tried in every form admissible in the practice of those courts,—by way of averment in pleading,—by way of motion to set aside on affidavits of fraud and falsehood; and the invariable answer of the English courts, from the days of Queen Elizabeth to the days of Queen Victoria, has been, that the return is conclusive between the parties to the suit, neither traversable in pleading, nor liable to contradiction by a motion to set it aside, or in any other form of procedure, but an action against the sheriff.

All the reasons that forbid any question of the truth of the return in the courts of law, equally forbid it in the courts of equity. In fact, the equitable discretion exercised by courts of law in the modern practice of motions would be quite competent to administer relief, if the case were relievable on the principles of equity.

The decisions of the courts of law are therefore conclusive against relief in the courts of equity.

The sheriff's return of *rescous* on mesne process is conclusive against the party charged,—equivalent to a conviction; he is not put upon interrogatories, because he cannot traverse the return, and the fine is summarily imposed. *Rex v. Elkins*, 4 Burr., 129; *Rex v. Pember*, Cas. Temp. Hardw., 112. So, on *sci. fa.* against terre-tenants, the return of *sci. feci*. A. B.,

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tenant of one messuage, &c., is conclusive, and he cannot plead *non-tenure*. *Flud v. Pennington*, Cro. Eliz., 872; *Whitrong v. Blaney*, 2 Mod., 10; *Barr v. Satchell*, 2 Str., 813. Though a strong case of collusion and fraud between sheriff and defendant be made out, the return of *non est inventus* is conclusive on plaintiff. *Goubot v. DeCrouy*, 3 Tyrw., 906; s. c., 1 Crompt. & M., 772. See *Harrington v. Taylor*, 15 East, 378; Lofft, 371.

Mr. Justice GRIER delivered the opinion of the court.

The appellant, Humphreys, who was complainant below, filed his bill against the defendants, praying an injunction against the issuing of an execution on a judgment they had obtained against him at law.

His bill sets forth, that he was one of the sureties of Richard Bland, late sheriff of Claiborne County, in his official bond. That in March, 1839, the present defendants instituted a suit on the bond against Bland and his sureties, on which the Circuit Court rendered a judgment in favor of the defendants. The cause was removed to this court by writ of error, where the judgment of the Circuit Court was reversed, *312] and the case *remanded to the Circuit Court, with directions to enter judgment against Humphreys, the surviving surety. This was in February, 1845. In the meanwhile, at May term, 1840, judgments were entered in the State Circuit Court of Claiborne County against the sheriff and his sureties on the same bond, and the whole amount of the penalty collected, by levy and sale of complainant's property.

The bill, moreover, avers, that complainant had no notice or knowledge whatsoever of the suit and proceedings against him by these defendants, till after the case was remanded by this court; that the sheriff's return of service of the writ on him was false, and made at the request of Bland, for the purpose of keeping the complainant in ignorance of the pendency of the suit; that when the cause was remanded to the Circuit Court, he offered to plead his payment of the bond *puis darrein continuance*; but the court refused to receive the plea, on the ground, that the mandate of the Supreme Court was imperative on them to enter a judgment for the plaintiff.

The defendants demurred to this bill for want of equity, and the court below sustained the demurrer, and dismissed the bill, and the complainant has appealed to this court.

Do the facts set forth in the bill, and admitted by the demurrer, entitle the complainant to the injunction prayed for?

According to the view entertained by the court of the true

merits of this case, it will be unnecessary to examine the question so much mooted on the argument, as to the conclusiveness of the sheriff's return, or whether equity would interfere, where a false return has been made by the sheriff in collusion with a co-defendant, without any fraud or fault of the plaintiff. We shall, therefore, consider the case as if the complainant had full notice of the suit at law, and the summons had been duly served on him.

The laws of Mississippi limit the liability of the sureties in the official bond of the sheriff to the amount of the penalty. Any person injured by a default of the sheriff in paying over money collected by him may have a judgment entered on the bond for the amount due to him, on motion, without service of process, or stay of execution. This judgment is a lien on all the personal and real property of the defendants, and has a priority over all judgments subsequently obtained.

As the officer is liable to the extent of his defaults, and the surety only to the extent of the bond, difficulties will, no doubt, often occur as to the mode in which sureties may defend themselves, when judgments are demanded exceeding the amount of the penalty. If the prior judgments should be paid *out of the property of the sheriff, the sureties might wrongfully escape, if the amount of prior [*318 judgments might be pleaded against subsequent demands. On the contrary, if it could not, the surety might be compelled to pay more than the amount of his bond, unless the court should protect him in some way.

In some States, where a similar law prevails as to suits on sheriff's bonds, each suitor is permitted to take a judgment on the bond for the amount of his claim, and when the sureties have paid in the whole amount of the penalty, all further executions are stayed by the court, and the money apportioned to the claimants according to their respective priorities. But, whatever may be the practice of the courts of Mississippi in such cases, it is clear, that, when the surety has paid the whole penalty of his bond, he should, at some stage of the proceedings, be suffered to plead this defence to further exactions. If he has had no such opportunity before judgment, the court, on motion, should permit it to be done after judgment, and order a stay of execution. Formerly, courts of law gave a remedy in such cases, by a writ of *audita querela*,—"a writ," it is said, "of a most remedial nature, and invented lest in any case there should be an oppressive defect of justice, where a party who has a good defence is too late in making it in the ordinary forms of law"; and although it is said to be in its nature a bill in equity, yet, in modern

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practice, courts of law usually afford the same remedy on motion in a summary way. The practice in Mississippi seems to prefer a bill in equity for the same purpose.

And courts of equity usually grant a remedy by injunction against a judgment at law, upon the same principles. In *Truly v. Wanzer*, 5 How., 142, this court say,—“It may be stated as a general principle with regard to injunctions after a judgment at law, that any fact which proves it to be against conscience to execute such judgment, and of which the party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will authorize a court of equity to interfere by injunction to restrain the adverse party from availing himself of such judgment.” (See also Story, Eq. Jur., § 887.)

In the case before us, the surety had been compelled to pay the whole amount of his bond by process from the State courts, before the present defendants obtained their judgment against him, but after the institution of their suit. This would have been a good defence to the action if pleaded *puis darrein continuance*. The complainant tendered this plea at *314] the proper *time, and was refused the benefit of it, not because it was adjudged insufficient as a defence, but because the court considered they had no discretion to allow it. The mandate from this court was, probably, made without reference to the possible consequences that might flow from it. At all events, it operated unjustly, by precluding the complainant from an opportunity of making a just and legal defence to the action. The payment was made while the cause was pending here. The party was guilty of no laches, but lost the benefit of his defence, by an accident over which he had no control. He is, therefore, in the same condition as if the defence had arisen after judgment, which would entitle him to relief by *audita querela*, or a bill in equity for an injunction.

We are of opinion, therefore, that the complainant was entitled to the relief prayed for in his bill, and that the decree of the court below should be reversed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged,

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and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs, and that this cause be, and the same is hereby, remanded to the said Circuit Court, for further proceedings to be had therein, in conformity to the opinion of this court.

ROBINSON LYTLE AND LYDIA LOUISA LYTLE, HIS WIFE, ELIAS HOOPER AND MARY E. HOOPER, HIS WIFE, AND NATHAN H. CLOYES, A MINOR, UNDER TWENTY-ONE YEARS OF AGE, BY WILEY CLAYTON, HIS GUARDIAN, v. THE STATE OF ARKANSAS, WILLIAM RUSSELL, THE REAL ESTATE BANK OF THE STATE OF ARKANSAS, THE TRUSTEES OF SAID REAL ESTATE BANK AFORESAID, RICHARD C. BYRD, JAMES PITCHER, WM. P. OFFICER, EBENEZER WALTERS, JOHN WASSELL, JOHN W. COCKE, FREDERICK W. TRAPNALL, GEORGE C. WATKINS, SAMUEL H. HEMPSTEAD, JOHN ROBINS, JOHN PERCEFULL, JAMES S. CONWAY, HENRY F. PENDLETON, JACOB MITCHELL, THOMAS S. REYNOLDS, JOHN H. LEECH, WM. E. WOODRUFF, CHESTER ASHLEY, WM. J. BYRD, WM. W. DANIEL, AND JOHN MORRISON AND EDNEY, HIS WIFE.

The preëmption act of May 29th, 1830, conferred certain rights upon settlers upon the public lands, upon proof of settlement or improvement being made to the *satisfaction of the register and receiver, agreeably to the rules prescribed by the Commissioner of the General Land Office.¹ [*315]

The commissioner directed the proof to be taken before the register and receiver, and afterwards directed them to file the proof where it should establish to their entire satisfaction the rights of the parties.

Where the proof was taken in presence of the register only, but both officers decided in favor of the claim, and the money paid by the claimant was received by the commissioner, this was sufficient. The commissioner had power to make the regulation, and power also to dispense with it.

This proof being filed, there was no necessity of reopening the case when the public surveys were returned.

The circumstance that the register would not afterwards permit the claimant to enter the section, did not invalidate the claim.

The preëmptioner had no right to go beyond the fractional section upon which his improvements were, in order to make up the one hundred and sixty acres to which settlers generally were entitled.

No selection of lands under a subsequent act of Congress could impair the right of a preëmptioner, thus acquired.²

¹ CITED. *Kahn v. Old Telegraph Mining Co.*, 2 Utah T., 212. See *O'Brien v. Perry*, 1 Black, 139; *Wirth v. Branson*, 8 Otto, 121; *Simmons v. Wagner*, 11 Id., 261.

² See *Cunningham v. Ashley et al.*, 14 How., 379; *Garland v. Wynn*, 20 Id., 8; *United States v. The Commissioner*, 5 Wall., 605; *Chapman v. Quinn*, 56 Cal., 276, 287, 294.

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THIS case was brought up from the Supreme Court of the State of Arkansas, by a writ of error issued under the twenty-fifth section of the Judiciary Act.³

It involved the validity of an entry of four fractional quarter-sections of land, one of which only, namely, the northwest fractional quarter of section number two in township one north of range twelve west, was passed upon by this court.

The history of the claim is this.

The act of Congress passed on the 29th of May, 1830 (4 Stat. at L., 420), gave to every occupant of the public lands prior to the date of the act, and who had cultivated any part thereof in the year 1829, a right to enter at the minimum price, by legal subdivisions, any number of acres not exceeding one hundred and sixty, or a quarter-section, to include his improvement; provided, the land shall not have been reserved for the use of the United States or either of the several States.

In the third section of the act it is provided, that, before any entries being made under the act, proof of settlement or improvement shall be made to the satisfaction of the register and receiver of the land district in which the lands may lie, agreeably to the rules prescribed by the Commissioner of the General Land Office for that purpose.

On the 10th of June, 1830, the commissioner issued his instructions to the receivers and registers, under the above act, in which he said, that the fact of cultivation and possession required "must be established by the affidavit of the occupant, supported by such corroborative testimony as may be entirely satisfactory to both; the evidence must be taken by a justice of the peace in the presence of the register and receiver." And the commissioner directed, that, where the improvement was wholly on a quarter-section, the occupant *316] was limited to such *quarter; but where the improvement is situated in different quarter-sections adjacent, he may enter a half quarter in each to embrace his entire improvement.

Another circular, dated 7th February, 1831, was issued, instructing the land officers, where persons claiming preëmption rights had been prevented, under the above circular, from making an entry, "by reason of the township plats not having been furnished by the surveyor-general to the register of the land office, the parties entitled to the benefit of said act may be permitted to file the proof thereof, under the instructions

³ Further decision, 22 How., 193.

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heretofore given, identifying the tract of land as well as circumstances will admit, any time prior to the 30th of May next." And they were requested to "keep a proper abstract or list of such cases wherein the proof shall be of a character sufficient to establish, to their entire satisfaction, the right of the parties, respectively, to a preëmption," &c. "No payments, however, were to be received on account of preëmption rights duly established, in cases where the townships were known to be surveyed, but the plats whereof were not in their office, until they shall receive further instructions."

It may be here remarked, that the public surveys of the land in question were not completed until the 1st of December, 1833, nor returned to the land office until the beginning of the year 1834.

On the 2d of March, 1831, Congress passed an act (4 Stat. at L., 473), "granting a quantity of land to the Territory of Arkansas, for the erection of a public building at the seat of government of said Territory"; but this act did not designate what specific tract of land should be granted for that purpose.

On the 23d of April, 1831, Cloyes filed the following affidavit in the office of the register, in support of his claim to a preëmption right.

"Preëmption Claim, May 29, 1830.

"Nathan Cloyes's testimony, taken on the 23d of April, 1831, before James Boswell, a justice of the peace for the County of Independence, in the register's office, in the presence of the register.

"Question by the Register. What tract of the public lands did you occupy in the year 1829, that you claimed a right of preëmption upon?

"Answer. On the N. W. fract. $\frac{1}{4}$ of sec. 2, in township 1 north of range 12 west, adjoining the Quapaw line, being the first fraction that lies on the Arkansas River, immediately below the town of Little Rock, and contains about twenty-eight *or twenty-nine acres, as I have been informed by the [*317 county surveyor of Pulaski County; and I claim under the law the privilege to enter the adjoining fraction or fractions, so as not [to] exceed one hundred and sixty acres, all being on the river below the before-named fraction.

"Question as before. Did you inhabit and cultivate said fraction of land in the year 1829; and if so, what improvement had you in that year in cultivation?

"Answer. I did live on said tract of land in the year 1829,

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and had done so since the year 1826; and in the year 1829 aforesaid, I had in cultivation a garden, perhaps to the extent of one acre; raised vegetables of different kinds, and corn for roasting years (ears), and I lived in a comfortable dwelling, east of the Quapaw line, and on the before-named fraction.

"Question as before. Did you continue to reside and cultivate your garden aforesaid on the before-named fraction until the 29th of May, 1830?

"Answer. I did, and have continued to do so until this time.

"Question as before. Were you, at the passage of the act of Congress under which you claim a right of preëmption, a farmer; or, in other words, what was your occupation?

"Answer. I was a tin-plate worker, and cultivated a small portion of the fraction before named for the comfort of my family, and carried on my business in a shop adjoining my house.

"Question as before. Do you know of any interfering claim under the law, that you claim a preëmption right upon the fraction whereon you live?

"Answer. I know of none. And further this deponent saith not.

"NATHAN CLOYES.

"Sworn and subscribed to before me, the date aforesaid.

"J. BOSWELL, J. P."

On the same day, Cloyes filed also the corroborative testimony of John Saylor, Nathan W. Maynor, and Elliott Bursey.

On the 28th of May, 1831, the register and receiver made the following entry, and gave Cloyes the following certificate.

"Preëmption Claim, 29th May, 1830.

"Nathan Cloyes, No. 24, N. W. fractional $\frac{1}{4}$ 2, 1 N. 12 W. granted for the above fractional $\frac{1}{4}$, and reject the privilege of entering the adjoining fractions. May 28, 1831.

"H. BOSWELL, *Register.*

JOHN REDMAN, *Receiver.*"

*318] *On the 15th of June, 1832, Congress passed an act (4 Stat. at L., 531), granting one thousand acres of land to the Territory of Arkansas, "contiguous to and adjoining the town of Little Rock," for the erection of a court house and jail at Little Rock.

On the 4th of July, 1832, Congress passed another act (4 Stat. at L., 563, authorizing the Governor of the Territory to select ten sections of land to build a legislative house for the Territory.

On the 14th of July, 1832, Congress passed an act (4 Stat. at L., 603), giving to persons entitled to preëmption under the act of 1830, (but who had not been able to enter the same within the time limited, because the township plats had not been made and returned,) one year from the time when such township plats should be returned, to enter said lands upon the same terms and conditions as prescribed in the act of 1830.

On the 2d of March, 1833, Congress passed an act (4 Stat. at Large, 661) authorizing the Governor of the Territory to sell the lands grated by the act of 15th June, 1832.

Under these acts of Congress, Governor Pope made a part of his location upon the fractional quarter-sections in question, upon the 30th of January, 1833.

It has already been mentioned, that on the 1st of December, 1833, the public surveys were completed, and returned to the land office in the beginning of the year 1834.

On the 5th of March, 1834, the heirs of Cloyes (he being dead) paid for the four fractional quarter-sections, and took the following receipt.

“Receiver’s Office at Little Rock, March 5, 1834.

“Received by the hands of Ben Desha, from Lydia Louisa Cloyes, Mary Easter Cloyes, Natham Henry Cloyes, and William Thomas Cloyes, (heirs of Natham Cloyes, deceased, late of Pulaski County, A. T., the sum of one hundred and thirty-five dollars and seventy-six and $\frac{1}{4}$ cents, being in payment for the northwest and northeast fractional quarters of section two, and the northwest and northeast fractional quarters of section one, in fractional township one, north of the base line, and range twelve, west of the fifth principal meridian, containing in all one hundred and eight 61-100 acres, at \$1.25 per acre.

“\$135.76 $\frac{1}{4}$.

P. T. CRUTCHFIELD, *Receiver.*

“A part of the land for which the within receipt is given, to wit ‘the northwest fractional quarter of section two,’ forms a part of the location made by Governor Pope, in selecting 1,000 *acres adjoining the town of Little [*319 Rock, granted by Congress to raise a fund for building a court-house and jail for the Territory of Arkansas; and

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this indorsement is made by direction of the Commissioner of the General Land Office.

“P. T. CRUTCHFIELD, *Receiver*.

“*Receiver's Office at Little Rock, March 5, 1834.*”

In 1843 the heirs of Cloyes filed a bill against all the persons mentioned in the title of this statement, who had purchased various interests in these fractional quarter-sections, had claimed title under Governor Pope. The bill was filed in the Pulaski Circuit Court of the State, setting forth the above facts, and praying that the defendants might be ordered to surrender their patents and other muniments of title to the complainants.

The parties who were interested in the northwest fractional quarter of section number two answered the bill. The other parties demurred.

The answers admitted that proof of a preëmption right to the northwest fractional quarter of section two was made by Cloyes at the time and in the manner set forth in the bill; but deny that he had a valid preëmption to it. They admit also, that Governor Pope selected said quarter in pursuance of the two acts of Congress of 15th June, 1832, and 2d March, 1833, but deny that he did so illegally or by mistake.

In July, 1844, the Pulaski Circuit Court sustained the demurrer of the parties who had demurred, and dismissed the bill as to those who had answered.

In July, 1847, the Supreme Court of Arkansas, to which the cause had been carried, affirmed the judgment of the court below, and a writ of error brought the case up to this court.

It was argued by *Mr. Lawrence* and *Mr. Badger*, for the plaintiffs in error, and *Mr. Sebastian*, for the defendants in error.

The counsel for the plaintiffs in error said that the three following questions arose.

1. Was Cloyes entitled to have entered the land in question on the 28th of May, 1831, if the township plat had at that time been in the land office?

2. Did the act of 15th June, 1832, granting to the Territory of Arkansas one thousand acres of land, generally, confer any specific right to this particular fraction before its actual selection by the Governor?

3. If not, then did not the act of 14th July, 1832, reserve this fraction from selection, location, and sale, until the

*expiration of one year from the return of the town-ship plat to the land office? [*320

In regard to the first question, there is but one objection which can be urged with even a tolerable amount of plausibility in its favor, (that which is made the first ground of demurrer by those who have demurred to the bill,) namely, that the proof exhibited in the bill does not appear to have been taken in the presence of the register and receiver.

The circular dated June 10, 1830, from the General Land Office, contains, among other things, the following paragraph, viz:—"The evidence must be taken by a justice of the peace, in the presence of the register and receiver, and be in answer to such interrogatories propounded by them as may be best calculated to elicit the truth."

The caption of the testimony in the record is, "Nathan Cloyes's testimony, taken on 23d April, 1831, before James Boswell, a justice of the peace for the County of Independence, in the register's office, in the presence of the register." It is maintained that this omission in the caption to make it appear that the evidence was taken before the register and receiver, destroys Cloyes's right of preëmption. To this view several answers may be given. It does not positively appear that the receiver was not present, and the presumption of law is, that a government officer has done his duty till the contrary appears. *Wilcox v. Jackson*, 13 Pet., 511; *Winn et al. v. Patterson*, 9 Pet., 663; 1 Cooke (Tenn.), 492; 3 Yerg. (Tenn.), 309; 2 Tenn., 154, 284, 306, 421. It does appear that both the register and receiver, on the same day (23d April, 1831), admitted Cloyes's right to enter the land in question.

But suppose the proof was not taken in presence of both the register and receiver, still the land office circular was merely directory to the officers as to the manner of taking the proof, and any mere error or irregularity on the part of the officers cannot prejudice the rights of the preëmption. 3 Johns. (N. Y.) Ch., 275; 2 Cond. Rep., 237, 243; 2 Edw. (N. Y.), 261; 4 How. (Miss.), 57; *Ross v. Doe*, 1 Pet., 655; *Pond v. Negus*, 3 Mass., 230; *Rodebaugh v. Sanks*, 2 Watts (Pa.), 9; *Holland v. Osgood*, 8 Vt., 280; *Corliss v. Corliss*, Id., 390; *People v. Allen*, 6 Wend. (N. Y.), 486.

The Commissioner of the General Land Office, who issued the circular, by authorizing the receiver to take the payment offered by the heirs of Cloyes, without taking any exception to the manner in which the proof had been taken, suspended, *pro hac vice*, the regulation, and sanctioned the mode in which

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*321] it was in fact taken. The regulation itself was full of *inconvenience, was never fully carried out in fact, and was finally rescinded by the circular of 22d July, 1834 (2 Land Laws, 589).

The decision of the register and receiver was in favor of Cloyes's right to the northwest fractional quarter of section two, and it being upon a matter within their exclusive jurisdiction, and no appeal being given, that decision was final and conclusive. *Wilcox v. Jackson*, 13 Pet., 498.

Cloyes's right of preëmption, then, was perfect, and he was only prevented from consummating it by the fact, that the township plat was not returned before the expiration of the preëmption law of 1830.

2. The act of 15th June, 1832, (which was passed after the act of 20th May, 1830, had expired,) was only a general grant of one thousand acres of land in the vicinity of Little Rock, without any specification or description of any particular land whatever, "which lands," it provides, "shall be selected by the Governor of the Territory in legal subdivisions," &c.

We maintain that, before such selection, there was no appropriation of, or lien upon, any particular tract. It was the selection by the Governor that was to withdraw any tract from the public domain. 5 How., 10.

Covenant to settle particular lands, if for valuable consideration, creates a lien upon the lands, which will be enforced against all but a purchaser for value and without notice. 1 Vern., 206; 1 P. Wms., 282, 429.

But covenant to settle lands of a particular value, without mentioning any lands in particular, creates no lien on any of the covenantor's lands. 1 P. Wms., 429; 4 Bro. Ch., 468, Eden's note; *Russell v. Transylvania University*, 1 Wheat., 432.

Governor Pope did not make his selection until the 30th of January, 1833.

3. Prior to this selection, the act of 14th July, 1832, was passed, giving to persons entitled to preëmption under the act of 29th May, 1830, but who had not been able to enter said lands, because the township plats had not been made and returned, the right to enter said lands, on the same conditions in every respect, within one year from the time when said township plats should be returned.

It is clear, then, that if the grant of one thousand acres to Arkansas did not confer a specific right to any particular land, until selection made by its Governor, (and that selection was not made until after this act of 14th July, 1832, was passed,)

then the latter act reserved from any future selection lands which came within its provisions. The northwest fractional quarter *of section two could not be legally selected [*322 by the Governor, in 1833, because Cloyes had a right of preëmption to it under the act of 29th May, 1830, which the want of the township plat had alone prevented him from completing. That township plat was not returned until the beginning of the year 1834. The act of 14th July, 1832, gave him until the year 1835 to make his entry; and within that time he made his payment, and applied to enter the land.

It is manifest, then, that the bill should have been sustained by a decree in favor of the right of Cloyes's heirs to the northwest fractional quarter of section two, on which his settlement and cultivation were proved.

As to the remaining fractional quarters, the parties interested have filed a demurrer to the bill, setting out several grounds of demurrer. The first and principal of these grounds has already been answered. Most of the other grounds are but different statements of a single objection, namely, that Cloyes, having proved his settlement upon one quarter fractional section alone, could not legally claim any thing beyond the fractional quarter on which he was settled.

The act of 29th May, 1830, does not restrict the right of preëmption to the quarter-section on which settlement is made. The first section is,—“That every settler or occupant of the public lands, prior to the passage of this act, who is now in possession, and cultivated any part thereof in the year one thousand eight hundred and twenty-nine, shall be, and he is hereby, authorized to enter with the register of the land office for the district in which such land may lie, by legal subdivisions, any number of acres, not more than one hundred and sixty, or a quarter-section, to include his improvements, upon paying,” &c. 1 Land Laws, 173.

The only restriction which the law imposes is one hundred and sixty acres, to be entered by legal subdivisions, and to include his improvement. Within these conditions, he may enter any number of acres and any number of legal subdivisions. But we are told that the General Land Office put upon this law the construction, that the claimant was to be confined to the fraction on which he settled. It is true that for a time this construction did prevail in the General Land Office, and, as we contend, without any warrant of law.

But that construction has long since been overruled in that office. It was overruled by express act of Congress. The second section of the act of 14th July, 1832, provided,—“That the occupants upon fractions shall be permitted, in

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like manner, to enter the same, so as not to exceed in quantity one *quarter-section; and if the fractions exceed *323] a quarter-section, the occupant shall be permitted to enter one hundred and sixty acres, to include his or their improvement, at the price aforesaid."

Since that time, a different construction has prevailed in the General Land Office. See Circular, March 1, 1834, 2 Land Laws, 587. See also the letter of Secretary of Treasury of October 31, 1833, 2 Land Laws, 572; also Circular of 7th May, 1833.

Mr. Sebastian, for the defendants in error, contended,—

First, that the proof of preëmption was not taken in the presence of the register and receiver, agreeably to the rules prescribed by the Commissioner of the Land Office. The authority conferred upon them was joint, not only in taking the testimony, but in deciding on the sufficiency of the proof. Proof made to one was not a compliance with the law. 5 How. (Miss.), 752; 13 Pet., 511; 1 Pet., 340; Attorney-General's Opinion, in 2 Land Laws, 85, 98.

But it is said, that it does not positively appear that the receiver was not present, and the presumption of law is, that every government officer does his duty until the contrary appears. The rule is well stated, but admits of exceptions. It is a mere rule of evidence, to supply proof of relevant facts where the contrary does not appear. The silence of the proof upon this subject would have left the presumption to operate to its fullest extent in favor of the legality of the proceedings, but it went further, and disclosed the fact that the proof was taken before the register alone. *Conclusio unius exclusio alterius*, is a rule of construction that may well apply in this instance. It is not easy to see how the absence of the receiver could be better stated than in the terms which affirmed the presence of the register.

Again, it is contended that the land office circular requiring proof to be taken in the presence of the register and receiver was directory to the officers as to the manner of taking the proof, and that any irregularity upon the part of the officers cannot prejudice the right of preëmption.

It is undoubtedly true, that where the State intrusts a duty to a public officer, and prescribes a particular manner in which he shall perform it, an irregularity in the manner of its performance shall not prejudice the right appertaining to the act of performance. The rule extracted from the cases seems to admit of many exceptions. It applies to the acts of ministerial officers, and not to those who act in a judicial

capacity; to those who act irregularly within the limits of authority, but *not where there is a total want of it [*324 (see *Wilcox v. Jackson*, 13 Pet.; 2 Tenn., 154); to those who act as a public and common agent, independent of or as a trustee of the parties, but not where the act is controlled or to be done by the party himself. 2 Tenn., 284. Now here the register and receiver acted in a judicial capacity. (*Wilcox v. Jackson*, the Opinion of Attorney-General, above cited.) The act of May 29th, 1830, § 4, makes in the duty of the settler to make the proof, and the circular from the land office prescribes how and before whom he shall make it. The true question, therefore, in this case is, not whether a ministerial duty has been imperfectly performed, but whether a judicial function has not been performed without any authority at all. The only adjudged case upon the direct point has taken this view of the question. *Fulton v. McAfee*, 5 How. (Miss.), above cited.

The supposition that the letter from the Treasury Department (2 Land Laws, 572), by authorizing the receiver to take payment from Cloyes, suspended *pro hac vice* the general regulation as to proof, is unfounded in the terms of that letter. It was done expressly, not to waive any objection, but “to enable them the more effectually to maintain their rights before the judicial tribunals, without prejudice to an adjudication of the land office.” It decided in favor of Governor Pope’s locations, and left Cloyes’s claim just where it found it. Had it been so intended, it was then too late to remove the defect and cut out the intervening rights under the location of Governor Pope. The general regulation was not repealed until July 22, 1834, and until all the rights in controversy had been fixed under the old law.

If the proof of preëmption should be considered regular, and in compliance with the act, and the authoritative instructions issued in conformity with it, then it is contended that the northwest fractional quarter of section two, a part of the lands sued for, was specifically appropriated by the act of Congress of 15th June, 1832 (4 Stat. at L., 531), granting one thousand acres of land to the Territory of Arkansas, “contiguous to and adjoining the town of Little Rock”; so that when the act of 14th July, 1832 (4 Stat. at L., 603), extending and reviving that of 29th May, 1830, was passed, there was nothing on which the act could operate. When the supplemental act was passed, the tract on which the preëmption had once been granted and lapsed was no longer unappropriated land. The original act, thus revived, extended the right preëmption to unappropriated lands only. The land

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granted by the act of the 15th June to the Territory could *325] not, on the 14th of July *following, be considered unappropriated. Upon this point the instructions from the General Land Office of 10th June, 1830, were explicit. (2 Land Laws, 539.) In these it is said, "that all lands not otherwise appropriated, of which the township plats are or may be on file in the register's office, prior to the expiration of the law, are subject to entry." The preemption act of 1830 expired by its own limitation on the 29th of May, 1831, and before it was revived, July 14th, 1832, the act of 15th June granted the tract of land to the Territory. The proof of preemption describes the tract cultivated as being immediately below Little Rock, and the act of 15th June, 1832, above mentioned, grants to the Territory of Arkansas "a quantity of land not exceeding one thousand acres, contiguous to and adjoining the town of Little Rock." By this act the United States was concluded. It was not executory, but passed a present interest, and executed itself. It was not a general grant, but specific, and conveyed, not a mere right at large to locate, but certain lands, and although it did not pretend to fix the exterior limits or boundaries, yet one feature was well defined, most important in its operation in this case. The land was "contiguous to and adjoining the town of Little Rock." However indefinite in some features, its terms of description embraced the very tract on which the ancestor of complainants had claimed a preemption. This grant was a contract, and constituted a lien upon the lands coming within its descriptive terms. *Pinson and Harkins v. Ivey*, 1 Yerg. (Tenn.), 322; 2 Vern., 482; 1 P. Wms., 429; 2 Vern., 97; 1 Eq. Cas. Abr., 31, ch. 4, and 87, ch. 6.

It was, if not a grant, at least a reservation of all those lands "adjoining and contiguous to the town of Little Rock," for satisfaction of the grant, and, to that extent and for that purpose, was an appropriation by law. It was an exemption of such lands from the operation of all subsequent laws, until its objects could be satisfied and the act have effect. When the land should be selected, the title would legitimately relate to the date of the act, which is the source of the title. This relation, however, is unnecessary to overreach the title of complainants, as the selection of the lands was long prior to the application of Cloyes's heirs to enter them, in March, 1834, under the act of 14th July, 1832. Not only so, but on the 2d of March, 1833, after the location or selection by Governor Pope, an act was passed authorizing him to sell the lands thus selected, of which the northwest fractional quarter of section two was a part. See 4 Stat. at L., 661.

This brings us to the consideration of the question as to the competency of the United States to thus appropriate the land *in controversy, (as they most unquestionably [*326 did by the acts referred to,) and the nature of the interest in the public domain acquired by settlers upon it.

(The counsel then proceeded to argue, that the preëmption law was not a grant, but merely a bounty which the United States may at any time before final acceptance of its terms and performance of its conditions wholly modify, destroy, or restrict. 2 Land Laws, 101, 102; 9 Cranch, 92; 1 Scam. (Ill.), 367; 3 Pet. C. C., 40; 5 Mart. (La.) N. s., 417; 6 Mart. (La.), 342; 9 La., 53; 5 How. (Miss.), 765; 13 Pet., 514.)

But, waiving the question whether the act of June, 1832, was a grant, or even a positive reservation, I recur again to the argument, that this act was at least an appropriation. That is all that is necessary to sustain the title of the defendants. It is sufficient alone that the act of 15th June, 1832, was a "setting apart" of a portion of the public domain for any purpose. This is but an indication by the government, through some one of its departments, of its intention to devote it to some particular purpose. The title still remains in the United States, and the land thus indicated is withheld from all subsequent laws. Whether as a grant the act was specific or general, whether it passed a present or future interest, commencing upon the "selection," cannot alter its operation as an appropriation. It can be an appropriation of all lands within its descriptive terms, without being a grant of them. The donation was for one thousand acres, "contiguous to and adjoining the town of Little Rock." The appropriation was therefore coextensive, not with the boundaries that might be ascertained by the selection under the act, but it was as broad as the description of the lands out of which the selection was to be made. This will be fully comprehended by observing the clear distinction between the tract selected and the body of lands out of which the selection was authorized to be made. The appropriation was temporary, and for a particular purpose. Still, it was to this extent an appropriation. By this act the lands were "set apart," and severed from the public domain, until the purposes of that act could be satisfied. Doubtless it is true, that, when the objects of the appropriation were accomplished, the lands held from disposition by its force would relapse into the mass of unappropriated land. But in this case, the appropriation of this tract, amongst others embraced in this description of the law, held it until it was selected, and the selection held it for ever.

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Again, when the act of 14th July, 1832, was passed, the lands claimed by the complainants were not surveyed, nor *327] any plats on file in the register's office at the time of the expiration of the act of 1830. The bill states the surveys to have been made, and the plats thereof to have been returned, in December, 1833, and January, 1834. To such lands the act of 1830 did not extend the right of preëmption. On this point the circular letter of instructions from the General Land Office, of June 10th, 1830 (2 Land Laws, 540), is explicit:—"Lands not otherwise appropriated, of which the township plats are or may be on file in the register's office prior to the expiration of the law (29th May, 1831), are subject to entry under the act." These instructions are in precise conformity with the act, and should be considered as a part of it. The whole tenor of the act shows that it never contemplated the possibility of a preëmption on any other than surveyed lands, officially known to be such. All the terms of the act, particularly the fourth section, contemplate the maps of the surveys being on file. The case of settlers upon the unsurveyed domain was a clear omission. Such settlers never came within its provisions. The act of 14th July, 1832, was designed for the relief of that class. So far it was not a revival, but an extension, of the terms of the act of 1830. It embraced what the old act did not. The cultivation and possession of unsurveyed land was nothing under the first act. They were the very basis of right under the new law. Whatever interest, therefore, the complainants had, is legally to be ascribed to this latter act, notwithstanding the proof of preëmption before the expiration of the preëmption law. Should this question, then, be considered as a mere contest between titles by relation, extending retrospectively to the first link in them, the defendants have the elder title.

The second ground of the demurrer is, "that the bill shows on its face that said Cloyes was not the settler or occupant of the northwest and northeast quarters of section two, and northwest and northeast quarters of section one, township one, north range twelve west." The third, fourth, fifth, sixth, seventh, eighth, and ninth causes of demurrer are all based upon the second cause assigned, are altogether substantially the same proposition, and may be considered in connection. The objections which they present are applicable alone to the title of complainants to the northeast fractional quarter of section two, and the northwest and northeast fractional quarters of section one, part of the lands claimed by the complainants. These tracts were claimed under the privilege, as appurtenant to the right of preëmption, proven on the tract cultivated,

which privilege was rejected. These three fractions are held by one *of the defendants under patents, issued upon selections made by Governor Pope, under different acts [*328 of Congress, granting ten sections of land to the Territory. Those acts have no connection with the title to the tract before considered. The claims thus located were assigned to Wm. Russell, one of the defendants.

That the privilege of preëmption did not extend to the additional fractions claimed as appurtenant to it, that the decision of the register and receiver was right in rejecting it, and that decision conclusive until reversed or set aside, and that the subsequent proceedings of the receiver at Little Rock in granting his certificate were unwarranted, appear by reference to the act of 29th May, 1830, the instructions of the Commissioner of the General Land Office under it, and the opinions of the Attorney-General in exposition of them.

(The counsel then proceeded to show that the title of the complainants was not good to the three fractional quarter-sections.)

Mr. Justice McLEAN delivered the opinion of the court.

This writ of error brings before us a decree of the Supreme Court of the State of Arkansas.

The complainants filed their bill in the Pulaski Circuit Court of that State, charging that Nathan Cloyes, their ancestor, during his life, claimed a right of preëmption under the act of Congress of the 29th of May, 1830, to the northwest fractional quarter of section numbered two in township one north of range twelve west. That he was in possession of the land claimed when the above act was passed, and had occupied it in 1829. That he was entitled to enter, by legal subdivisions, any number of acres, not more than one hundred and sixty, or a quarter-section, to include his improvement, upon paying the minimum price for said land. That Cloyes, in his lifetime, by his own affidavit, and the affidavits of others, made proof of his settlement on, and improvement of, the above fractional quarter, according to the provisions of the above act, to the satisfaction of the register and receiver of said land district, agreeably to the rules prescribed by the Commissioner of the General Land Office; and on the 20th of May, 1831, Hartwell Boswell, the register, and John Redman, the receiver, decided that the said Cloyes was entitled to the preëmption right claimed.

That on the same day he applied to the register to enter the northwest fractional quarter of section two, containing thirty acres and eighty-eight hundredths of an acre; also the

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*329] *northeast fractional quarter of the same section, containing forty-two acres and thirty-two hundredths of an acre; and also the northwest and northeast fractional quarters of section numbered one, in the same township and range, containing thirty-five acres and forty-one hundredths of an acre, the said fractional quarter-sections containing one hundred and eight acres and sixty-one hundredths of an acre; and offered to pay the United States, and tendered to the receiver, the sum of one hundred and thirty-five dollars seventy-six and a fourth cents, the government price for the land. But the register refused to permit the said Cloyes to enter the land, and the receiver refused to receive payment for the same, on the ground that he could only enter the quarter-section on which his improvement was made. That the other quarter-sections were contiguous to the one he occupied.

That under the act of the 29th of June, 1832, entitled, "An act establishing land districts in the Territory of Arkansas," the above fractional sections of land were transferred to the Arkansas land district, and the land office was located at Little Rock, to which the papers in relation to this claim of preëmption were transmitted.

The bill further states, that under an act of Congress of the 15th of June, 1832, granting to the Territory of Arkansas one thousand acres of land for the erection of a court-house and jail at Little Rock, and under "An act to authorize the Governor of the Territory to sell the land granted for a court-house and jail, and for other purposes," dated 2d March, 1833, John Pope, then Governor of said Territory, among other lands, selected, illegally and by mistake, for the benefit of the Territory, the said northwest fractional quarter of section numbered two, for which a patent was issued to the Governor of the Territory and his successors in office, for the purposes stated.

That the said John Pope, as Governor, under an act granting a quantity of land to the Territory of Arkansas, for the erection of a public building at the seat of government of said Territory, dated 2d March, 1831, and an act to authorize the Governor of the Territory to select ten sections to build a legislative house for the Territory, approved 4th July, 1832, selected the northeast fractional quarter of section two, and the northwest fractional quarter and northeast fractional quarter of section one, as unappropriated lands, and, having assigned the same to William Russell, a patent to him was issued therefor, on or about the 21st of May, 1834, both of which, the complainants allege, were issued in mistake and

in violation of law, and in fraud of the legal and vested right of their ancestor, Cloyes.

That after the refusal of the receiver to receive payment for *the land claimed, an act was approved, 14th July, [*330 1832, continuing in force the act of the 29th of May, [1830 1830, and which specially provided, that those who had not been enabled to enter the land, the preëmption right of which they claimed, within the time limited, in consequence of the public surveys not having been made and returned, should have the right to enter said lands on the same conditions, in every respect, as prescribed in said act, within one year after the surveys should be made and returned, and the occupants upon fractions in like manner to enter the same, so as not to exceed in quantity one quarter-section. And that this act was in full force before Governor Pope selected said lands, as aforesaid. That the public surveys of the above fractional quarter-sections were made and perfected on or about the 1st of December, 1833, and returned to the land office the beginning of the year 1834. On the 5th of March, 1834, the complainants paid into the land office the sum of one hundred and thirty-five dollars and seventy-six and one fourth cents, in full for the above-named fractional quarter-sections. That a certificate was granted for the same, on which the receiver indorsed, that the northwest fractional quarter of section two was a part of the location made by Governor Pope in selecting one thousand acres adjoining the town of Little Rock, granted by Congress to raise a fund for building a courthouse and jail for the territory; and that that indorsement was made by direction of the Commissioner of the General Land Office.

That the register of the land office would not permit the said fractional quarter-sections to be entered.

That the patentees in both of said patents, at the time of their application to enter the lands, had both constructive and actual notice of the right of Cloyes. And that the present owners of any part of these lands had also notice of the rights of the complainants.

The answer of the Real Estate Bank and trustees admits the proof of the preëmption claim of Cloyes, but they say, "From beginning to end it is a tissue of fraud, falsehood, and perjury, not only on the part of Cloyes, but also on the part of those persons by whose oaths the alleged preëmption was established. And they allege, that the lots four, five, and six, in block eight, in fractional quarter-section two, claimed by the bank, were purchased of Ambrose H. Sevier in the most perfect good faith, and without any notice or knowledge

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whatever, either constructive or otherwise, of any adverse claim thereto." That they have made improvements on the same, which have cost twenty-five thousand dollars, without *931] having it intimated *to them that there was any adverse claim, until all of said improvements had been completed.

James S. Conway, in his answer, denies the validity of the preemption right set up in the bill, and alleges that it was falsely and fraudently proved. And he says, that when he purchased, "he did not know that there was any *bond fide* adverse claim or right to said lots, or any of them; and he avers, that he is an innocent purchaser, for a valuable consideration, and without actual or implied notice, except as hereinafter stated." And he admits that he occasionally heard the claim of Cloyes spoken of, but always with the qualification that it was fraudulent and void, and had been rejected by the government.

Samuel A. Hempstead, in his answer, denies that, at the time of the purchase of said lots, or the recording of said deed, he had notice, either in fact or law, of the complainants' claim.

The other defendants filed special demurrers to the bill. The Circuit Court, as it appears, sustained the demurrers, and in effect dismissed the bill. The cause was taken to the Supreme Court of Arkansas by a writ of error, which affirmed the decree of the Circuit Court.

The demurrers admit the truth of the allegations of the bill, and, consequently, rest on the invalidity of the right asserted by the complainants. The answers also deny that Cloyes was entitled to a preëptive right, and a part, if not all of them, allege that they were innocent purchasers, for a valuable consideration, without notice of the complainants' claim.

The first section of the act of 29th May, 1830, gave to every occupant of the public lands prior to the date of the act, and who cultivated any part thereof in the year 1829, a right to enter at the minimum price, by legal subdivisions, any number of acres not exceeding one hundred and sixty or a quarter-section, to include his improvement; provided the land shall not have been reserved for the use of the United States, or either of the several States.

In the third section of the act it is provided, that, before any entries being made under this act, proof of settlement or improvement shall be made to the satisfaction of the register and receiver of the land district in which the lands may lie, agreeably to the rules prescribed by the Commissioner of the General Land Office for that purpose.

On the 10th of June, 1830, the commissioner issued his instructions to the receivers and registers under the above act, in which he said, that the fact of cultivation and possession required "must be established by the affidavit of the occupant, supported by such corroborative testimony as may be entirely *satisfactory to both; the evidence must [*332 be taken by a justice of the peace in the presence of the register and receiver." And the commissioner directed, that, where the improvement was wholly on a quarter-section, the occupant was limited to such quarter; but where the improvement is situated in different quarter-sections adjacent, he may enter a half quarter in each to embrace his entire improvement.

Another circular, dated 7th February, 1831, was issued, instructing the land officers, where persons claiming preëmption rights had been prevented under the above circular from making an entry, "by reason of the township plats not having been furnished by the surveyor-general to the register of the land office, the parties entitled to the benefit of said act may be permitted to file the proof thereof, under the instructions heretofore given, identifying the tract of land as well as circumstances will admit, any time prior to the 30th of May next." And they were requested to "keep a proper abstract or list of such cases wherein the proof shall be of a character sufficient to establish to their entire satisfaction the right of the parties, respectively, to a preëmption," &c. "No payments, however, were to be received on account of preëmption rights duly established, in cases where the townships were known to be surveyed, but the plats whereof were not in their office, until they shall receive further instructions."

Under this instruction, on the 28th of May, 1831, the register and receiver held that Nathan Cloyes was entitled to the northwest fractional quarter, as stated in the bill, but rejected the privilege of entering the adjoining fractions.

Several objections are made to this procedure. It is contended that the land officers had no authority to act on the subject, until the surveys of the township were returned by the surveyor-general to the register's office; and, also, that in receiving the proof of the preëmption right of Cloyes, the land officers did not follow the directions of the commissioner.

The first instruction of the commissioner, dated 10th June, 1830, required the proof to be taken in presence of the register and receiver, and it appears that the proof was taken in the presence of the register only.

The law did not require the presence of the land officers when the proof was taken, but, in the exercise of his discre-

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tion, the commissioner required the proof to be so taken. Having the power to impose this regulation, the commissioner had the power to dispense with it, for reasons which might be satisfactory to him. And it does appear that the presence of the register only, in Cloyes's case, was held sufficient. The right was sanctioned by both the land officers, *333] and by the *commissioner also, so far as to receive the money on the land claimed, without objection as to the mode of taking the proof. And, as regards the authority for this procedure by the land officers, it appears to be covered by the above circular of the commissioner, dated 7th February, 1831. In the absence of the surveys, the parties entitled to the benefits of the act of 1830 were "permitted to file the proof thereof," &c., identifying the tract of land, as well as circumstances will admit, any time prior to the 30th of May, 1831.

The register and receiver were constituted, by the act, a tribunal to determine the rights of those who claimed pre-emptions under it. From their decision no appeal was given. If, therefore, they acted within their powers, as sanctioned by the commissioner, and within the law, and the decision cannot be impeached on the ground of fraud or unfairness, it must be considered final.¹ The proof of the preëmption right of Cloyes being "entirely satisfactory" to the land officers under the act of 1830, there was no necessity of opening the case, and receiving additional proof, under any of the subsequent laws. The act of 1830 having expired, all rights under it were saved by the subsequent acts. Under those acts, Cloyes was only required to do what was necessary to perfect his right. But those steps within the law, which had been taken, were not required to be taken again.

It is a well-established principle, that where an individual in the prosecution of a right does every thing which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him.² In this case the preëmptive right of Cloyes having been proved, and an offer to pay the money for the land claimed by him, under the act of 1830, nothing more could be done by him, and nothing more could be required of him under that act. And subsequently, when he paid the money to the receiver, under subsequent acts, the surveys being

¹ DISTINGUISHED. *Barnard v. Ash-ley*, 18 How., 45. CITED. *Rector's Case*, 9 Fed. Rep., 18. *Wall.*, 88, 93; *Taborek v. B. & M. R. R. Co.*, 13 Fed. Rep., 106; s. c., 2 McCrary, 412; *Rector v. Gibbon*, 2

² See *The Yosemite Valley Case*, 15 McCrary, 286.

returned, he could do nothing more than offer to enter the fractions, which the register would not permit him to do. This claim of preëmption stands before us in a light not less favorable than it would have stood if Cloyes or his representatives had been permitted by the land officers to do what, in this respect, was offered to be done.

The claim of a preëmption is not that shadowy right which by some it is considered to be. Until sanctioned by law, it has no existence as a substantive right. But when covered by the law, it becomes a legal right, subject to be defeated only by a failure to perform the conditions annexed to it. It is founded in an enlightened public policy, rendered necessary by the enterprise of our citizens. The adventurous pioneer, who is *found in advance of our [*334 settlements, encounters many hardships, and not unfrequently dangers from savage incursions. He is generally poor, and it is fit that his enterprise should be rewarded by the privilege of purchasing the favorite spot selected by him, not to exceed one hundred and sixty acres. That this is the national feeling is shown by the course of legislation for many years.

It is insisted, that the preëmption right of Cloyes extended to the fractional quarter-sections named in the bill, the whole of them being less than one hundred and sixty acres. We think it is limited to the fractional quarter on which his improvement was made. This construction was given to the act by the commissioner in his circular of the 10th of June, 1830. He says, "The occupant must be confined to the entry of that particular quarter-section which embraces the improvement." The act gives to the occupant whose claim to a preëmption is established the right to enter, at the minimum price, by legal subdivisions, any number of acres not exceeding one hundred and sixty. But less than a legal subdivision of a section or fraction cannot be taken by the occupant. It is contended, however, that several fractional quarter-sections adjacent to the one on which the improvement was made may be taken under the preëmptive right, which shall not exceed in the whole one hundred and sixty acres. And the second section of the act of 14th July, 1832, which provides, "that the occupants upon fractions shall be permitted, in like manner, to enter the same so as not to exceed in quantity one quarter-section," it is urged, authorizes this view. But in the case of *Brown's Lessee v. Clements et al.*, 3 How., 666, this court say, the act of 29th May, 1830, "gave to every settler on the public lands the right of preëmption of one hundred and sixty acres; yet, if a settler

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happened to be seated on a fractional section containing less than that quantity, there is no provision in the act by which he could make up the deficiency out of the adjacent lands, or any other lands."

Did the location of Governor Pope, under the act of Congress, affect the claim of Cloyes? On the 15th of June, 1832, one thousand acres of land were granted, adjoining the town of Little Rock, to the Territory of Arkansas, to be located by the Governor. This selection was not made until the 30th of January, 1833. Before the grant was made by Congress of this tract, the right of Cloyes to a preëmption had not only accrued, under the provisions of the act of 1830, but he had proved his right, under the law, to the satisfaction of the register and receiver of the land office. He had, in fact, done every thing he could do to perfect this *335] right. No fault or negligence can *be charged to him. In the case above cited from 3 Howard, the court say,—"The act of the 29th of May, 1830, appropriated the quarter-section of land in controversy, on which Etheridge was then settled, to his claim, under the act, for one year, subject, however, to be defeated by his failure to comply with its provisions. During that time, this quarter-section was not liable to any other claim," &c. And the supplement to this act, approved 14th July, 1832, extended its benefits. The instruction of the commissioner, dated September 14th, 1830, was in accordance with this view. He says, "It is, therefore, to be expressly understood, that every purchase of a tract of land at ordinary private sale, to which a preëmption claim shall be proved and filed according to law, at any time prior to the 30th of May, 1831, is to be either null and void, (the purchase-money thereof being refundable under instructions hereafter to be given,) or subject to any legislative provisions."

By the grant to Arkansas, Congress could not have intended to impair vested rights. The grants of the thousand acres and of the other tracts must be so construed as not to interfere with the preëmption of Cloyes.

The Supreme Court of the State, in sustaining the demurrers and dismissing the bill, decided against the preëmption right claimed by the representatives of Cloyes; and as we consider that a valid right, as to the fractional quarter on which his improvement was made, the judgment of the State court is reversed; and the cause is transmitted to that court for further proceedings before it, or as it shall direct, on the defence set up in the answers of the defendants, that they are *bonâ fide* purchasers of the whole or parts of the fractional

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section in controversy, without notice, and that that court give leave to amend the pleadings on both sides, if requested, that the merits of the case may be fully presented and proved, as equity shall require.

Mr. Justice CATRON, Mr. Justice NELSON, and Mr. Justice GRIER dissented.

Mr. Justice CATRON.

The complainants allege that they have the superior [*664 equity to the fractional quarter-section No. 2, and to the other lands claimed by the bill, by virtue of an entry under a preference right; and that the respondents purchased and took their legal title with full knowledge of such existing equity in the complainants.

1. The defendants claiming section No. 2 (or part of it) deny that any such equity exists under the legislation of Congress. 2. That they purchased and took title without any knowledge of the claim set up; and being innocent purchasers, no equity exists as to them for this reason also, regardless of anything alleged against them. 3. That they expended large sums on the lands purchased, and made highly valuable improvements thereon, without any objection being made by complainants, or notice of their claim being given to respondents, and therefore a court of equity cannot interfere with their existing rights.

The bill was dismissed, without any particular ground having been stated in the decree why it was made for respondents; and in this condition of the record the cause is brought here by writ of error under the twenty-fifth section of the Judiciary Act.

The case made on the face of the bill was rejected, and the inquiry on such general decree must be, whether the claim set up sought protection under an act of Congress, or an authority exercised under one, so as to draw either in question, no matter whether the claim was well founded or not; and the fact being found that such case was made, then jurisdiction must be assumed to examine the decree; and, this being clearly true in the present instance, jurisdiction must be taken, and the equity claimed on part of complainants re-examined.

If, however, the decree had proceeded on the second or third grounds of defence, regardless of the first, and had so declared, then this court would not have jurisdiction to interfere, as no act of Congress, or an authority exercised [*665 under it, would have been drawn in question.

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In regard to the lands claimed, except the fractional quarter-section No. 2, we are agreed that the bill should be dismissed. So far, the controversy is ended; and as to section No. 2, I think the bill should be dismissed also.

The proof of occupancy and cultivation was made in April, 1831, under the act of 1830, pursuant to an instruction from the Commissioner of the General Land-Office having reference to that act. The act itself, the instruction given under its authority, and the proofs taken according to the instruction, expired and came to an end on the 29th of May, 1831. After that time, the matter stood as if neither had ever existed; nor had Cloyes more claim to enter, from May 29, 1831, to July 14, 1832, than any other villager in Little Rock.

July 14, 1832, another preëmption law was passed, providing, among other things, that when an entry could not be made under the act of 1830, because the public surveys were not returned to the office of the register and receiver before the expiration of that act (29th May, 1831), then an occupant who cultivated the land in 1829, and was in actual possession when the act of 1830 was passed, should be allowed to enter under the act of 1832 the quarter-section he occupied; and also adjoining lands to which the improvement extended, in legal subdivisions, so as to increase his entry to a quantity not exceeding 160 acres. Under the act of 1832, the entry in controversy was offered, and afterwards allowed, for the purpose of letting in complainants, so that a court of justice might investigate their claim, although it had been pronounced illegal at the department of public lands, the officers there acting under the advice of the Secretary of the Treasury.

The act of 1830, and the circular under it, having expired, the commissioner issued a new circular (28th July, 1832, 2 Land Laws and Opinions, 509), prescribing to registers and receivers the terms on which entries should be allowed under the act of 1832, by which circular proof was required of cultivation in 1829, and residence on the 29th of May, 1830; and that this proof should be made after the legal surveys were returned to the office of the register and receiver; and the right to make the proof, and to enter, should continue for one year after the surveys were returned, unless the lands were sooner offered at public sale; and that then the entry should be made before the public sale took place.

The necessity of this new proceeding is manifest. By the act of April 5, 1832, all actual settlers at this date (5th April,

*1832) were authorized to enter, within six months thereafter, one half quarter-section, including their re- [*666
spective improvements. Such rights stood in advance of claimants under the act of July 14, 1832. In the mutations of a new country, the fact was well known that improvements passed from hand to hand with great frequency by sale of the possessions; and one in possession (April 5, 1832) could well enter an improvement cultivated in 1829, and held on the 29th of May, 1830, he having purchased such possession. If Cloyes, therefore, had sold out to another before the act of April 5th was passed, then that other occupant, and not Cloyes, would have had the right to enter section No. 2; and therefore it was highly necessary to know who had the best right to a preëmption at the time each entry was offered. A still greater necessity existed for new proof. Until the surveys were returned, it was usually improbable for the register and receiver to know what subdivision had been occupied, or to what land, or how much, the preëmption right extended: and as all those who had a right of entry on lands not surveyed and legally recognized as surveyed were provided for by the act of 14th July, 1832, and the act required them to make proof, and to enter, within one year after the surveys were returned, by legal subdivisions according to the surveys, it is hardly possible to conceive what other course could have been adopted at the land-office than that which was pursued, as the surveys were the sole guide at the local offices where entries were made. But it is useless to speculate why the new circular was issued; the commissioner had positive power to do so, and the act, when done, bound every enterer. Nor could a legal entry be made under the act of 14th July, 1832, without the new proof, and an adjudication by the register and receiver, founded on such proof, that the right of entry existed; and as no such proof was offered by the complainants, they had no right to enter even the $30\frac{33}{100}$ acres, and certainly not the $108\frac{61}{100}$ acres. That an entry could not be lawfully made, without new proof to warrant it, for the lesser quantity, is our unanimous opinion; and in this we concur with those conducting the General Land-Office.

For another reason, I think their claim should be rejected. Little Rock was the seat of the Territorial government, at which certain public buildings were necessary; and on the 15th of June, 1832, an act was passed, that there be then granted to the Territory of Arkansas a quantity of land not exceeding one thousand acres, "contiguous to and adjoining" the town of Little Rock, for the erection of a court-house and

jail in said town, which lands shall be selected by the *Governor of the Territory, and be disposed of as the *667] Legislature shall direct, and the proceeds be applied towards building said court-house and jail.

On the 30th of January, 1833, the Governor selected the land, and filed his entry in the land-office at Little Rock, which entry was received and forwarded to the General Land-Office at Washington, and there ratified. The entry included the fractional quarter-section No. 2 now claimed by the heirs of Nathan Cloyes.

By the act of March 2, 1833, the Governor of the Territory was required to furnish to the Secretary of the Treasury a description of the boundaries of the thousand acres, and the Secretary was required to cause to be issued a patent therefor to the Governor, in trust, &c. And the Governor was directed to lay off in town lots, as part of the town of Little Rock, so much of the grant as he might deem advisable; and said Governor was authorized to sell said lots, and to dispose of the residue of said thousand-acre grant, and which sale was to be at auction, as regarded the town lots and the residue of the land. And he was also authorized to select and lay off three suitable squares, within this addition to the town, on which might be erected a State-house, a court-house, and a jail,—one square for each building,—for the use thereof, for ever, and for no other use.

The sales were to be for cash, and the Governor was directed to make deeds to purchasers when the purchase-money was paid. A patent issued to Governor John Pope for the land. In October, 1833, he proceeded to sell at auction, in lots and blocks, the fraction No. 2, in part, to Ambrose H. Sevier, under whom most of the defendants on No. 2 claim. Those who have answered deny that they had any knowledge of the claim of Cloyes when they purchased and took title; and that complainants stood by, permitted the purchase, and saw great city improvements made, and large sums of money expended, without objection, or any intimation being given that they intended to bring forward any such claim as the one now set up. But, as remarked in the outset, this court has no jurisdiction of these matters, and must therefore leave them to the State courts for adjudication and final settlement.

How, then, did the claim of the complainants stand when the city lots were sold in 1833? Cloyes never offered to enter fraction No. 2 alone; he offered to enter, says the bill (28th May, 1831), with the register at Batesville, sectional quarter No. 2 for $30\frac{3}{16}$ acres; northeast fractional quarter

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for $42\frac{2}{100}$ acres; and northwest and northeast fractional quarters of section No. 1, containing $35\frac{1}{100}$ acres; making *in all $108\frac{6}{100}$ acres. The proof made was, that he resided on No. 2 for $30\frac{2}{100}$ acres. This entry was [*668 refused, on a ground not open to controversy. By the act of 1830, only that quarter-section on which the improvement was could be entered, no matter what quantity it contained. In this we are unanimous now; and also, that the entry allowed is void for all but the fraction No. 2. Here was an offer to enter in 1831 that could not be lawfully done at that time; then a refusal to receive the entry was proper. The claim to enter $108\frac{6}{100}$ acres was adhered to, throughout, by Cloyes and his heirs. The offer to enter the whole quantity of $108\frac{6}{100}$ acres was again made in 1834; and we agree in opinion that the entry could not be lawfully received at the latter period for this larger quantity; less than the whole was never claimed.

As already stated, the entry that was admitted in 1834 was made to enable the party to litigate his rights, if any existed, as against the city title; not because the claim to enter was lawful, in the estimation of the Secretary of the Treasury and the Commissioner of the General Land-Office, for they had decided against its validity. The offer to enter being illegal, and the entry as received being illegal, it is not perceived on what ground a court of equity can uphold the claim even in part, and thereby overthrow a patent of the United States, and oust purchasers who relied on such patent.

In the next place, when the act of June 15, 1832, was passed, authorizing the Governor of Arkansas Territory to locate the thousand acres, the act of 1830 had expired; no right of entry existed in Cloyes. The land appropriated to public use was to be taken "contiguous to and adjoining the town of Little Rock"; all the land adjoining was reserved by the act, subject to a selection by the Governor, as a public agent; the grant was a present grant of the thousand acres, without limitation. Cloyes had no claim to interpose at that time; and on the selection being made, it gave precision to the land granted, and the title attached from the date of the act. In the language of this court, in *Rutherford v. Greene's Heirs* (2 Wheat., 206), the grant which issued to Governor Pope in pursuance of the act of June 15, 1832, "relates to the inception of his title." That also was a present grant of 5,000 acres to General Greene, made by an act of the Legislature of North Carolina, but unlocated by the act of Assembly. It was granted in the military district generally, and ordered to be surveyed by certain commissioners. Soon

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afterwards it was located by survey, and the question presented to this court was, as to what time the title had relation for the land selected; when it was held, that the *grant *669] was made by the act directly, and gave date to the title, and of necessity overreached all intervening claims for the land selected.

This case is far stronger than that. Here the act of 1830 was made part of the act of July 14, 1832; they stood as one act, and took date on the 14th of July. The act provides, "That no entry or sale should be made, under the provisions of this act, of lands *which shall have been reserved* for the use of the United States, or either of the States. The land, to the quantity of one thousand acres, adjoining the then town of Little Rock, had been expressly reserved by the act of the 15th of June, and stood so reserved when the act of July 14th was passed, subject to selection in legal subdivisions. The act of June 15th had no exception; the object was of too much importance to allow of any. If this villager could claim a preëmption, so might any other, and the act of June would have been without value, as the whole grant might have been defeated by occupant claims, and the seat of government transferred to private owners. This is manifest. Cloyes was a tinner, carrying on his trade in the edge of the town, and next his dwelling; adjoining to his house and shop he cultivated a garden, and on this occupancy and cultivation his claim was founded. Others, no doubt, were similarly situated. The seat of government was located on the public lands, then unsurveyed; and if the act of July 14, 1832, conferred an equity on Cloyes to take 160 acres, so it did on others in his situation all around the then town, and adjoining thereto. If the occupant could take the land adjoining, how was it possible for the Governor to add lots and squares to the seat of government? The intention of Congress manifestly contemplated that the right of selection should extend to all lands adjoining the then town; and that these were reserved for public use is, in my judgment, hardly open to controversy, on the face of the act of July 14th. But when we take into consideration the fact, that General Greene's title had been upheld on the principle that it took date with the act making the grant, and that the grant made in trust to Governor Pope depended on the same principle, and equally overreached all intervening claims, no doubt, it would seem, could well be entertained, either at the General Land Office or by purchasers, that this occupant had no just claim, and could not interfere and overthrow titles derived under the act of June 15, 1832.

And this is deemed equally true for another and similar reason. If this preference of entry for public use could be overthrown by a subsequent preëmption law, so may every other made to *secure locations for county seats and [*670 public works. The reservation was quite as definite as where salt springs and lead mines were reserved, or lands on which ship-timber existed. In such cases the President determines that the lands shall be reserved from sale, and this is always done after the surveys are executed and returned; and certainly, had such power been vested in him to reserve lands *adjoining* the seat of government of Arkansas, for the use thereof, he could have lawfully made the selection; and the authority to do so having been conferred by Congress on the Governor, his power was equal to that of the President in similar cases, where lands are reserved for public use by general laws.

For these reasons, I think the decree ought to be affirmed; and I have the more confidence in these views, because they correspond with the accumulated intelligence and experience of those engaged in administering the Department of Public Lands, and with the practice pursued at the General Land-Office, from the date of the act of July 14, 1832, to this time.

ORDER.

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This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Arkansas, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Supreme Court in this cause be, and the same is hereby, reversed, with costs, and that this cause be, and the same is hereby, remanded to the said Supreme Court, for further proceedings to be had therein in conformity to the opinion of this court.

*THOMAS E. BOSWELL'S LESSEE, PLAINTIFF, v. LUCIUS B. OTIS, ADMINISTRATOR, MARGARET DICKINSON, WIDOW, AND EDWARD F., JULIA S., MARGARET O., JOHN B. B., RODOLPHUS, MARTHA JANE, AND JAMES A. DICKINSON, MINOR CHILDREN, OF RODOLPHUS DICKINSON, DECEASED, BY L. O. RAWSON, THEIR GUARDIAN AND NEXT FRIEND, ET AL. [*336

The chancery act of Ohio of 1824 confers on the Court of Common Pleas general chancery powers. The twelfth section gives jurisdiction over the rights

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of absent defendants, on the publication of notice, "in all cases properly cognizable in courts of equity, where either the title to, or boundaries of, land may come in question, or where a suit in chancery becomes necessary in order to obtain the rescission of a contract for the conveyance of land, or to compel the specific execution of such contract."¹

A bill being filed to compel the specific execution of a contract relating to land, where the defendants were out of the State, the court passed a money decree, and ordered the sale of other lands than those mentioned in the bill. This decree was void, and no title passed to the purchaser at the sale ordered by the decree.

The act did not authorize such an act of general jurisdiction. A special jurisdiction only was given *in rem*.

Jurisdiction is acquired in one of two modes,—first, as against the person of the defendant, by the service of process, or secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case, the defendant is not personally bound by the judgment, beyond the property in question.²

¹ See *Nations et al. v. Johnson et al.*, 24 How., 203; *Oakley v. Aspinwall*, 4 N. Y., 513.

² QUOTED. *Pennoyer v. Neff*, 5 Otto, 724. *S. P. Cooper v. Reynolds*, 10 Wall., 308; *Williams v. Welton*, 28 Ohio St., 461; *Lutz v. Kelly*, 47 Iowa, 307; *Shepard v. Wright*, 59 How. (N. Y.) Pr., 512; *Belcher v. Chambers*, 53 Cal., 635.

Constructive notice may be sufficient in certain cases; but it can only be admitted in cases coming fairly within the provisions of the statute authorizing courts to make orders for publication, and providing that the publication, when made, shall authorize the court to decide and decree. [*Hollingsworth v. Barbour*, 4 Pet., 476; *Regina v. Lightfoot*, 26 Eng. L. & Eq., 117; *Nations v. Johnson*, 24 How., 206; *Galpin v. Page*, 18 Wall., 369.] *Earle et al. v. McVeigh*, 1 Otto, 508.

To gain jurisdiction by service by publication, the statute must be strictly pursued,—all the conditional facts required to be shown by affidavit must be alleged, distinctly and positively. *Fontaine v. Houston*, 58 Ind., 316. *S. P. Bradley v. Jamison*, 46 Iowa, 68; *Wheeler v. Cobb*, 75 N. C., 21.

The provisions of the Ky. Code, § 449—that "no lien on the property of a defendant constructively summoned shall be created otherwise than by an attachment . . . or by judgment,"—construed not to permit the property of a non-resident to be subjected merely by reference in the petition to its existence within the jurisdiction and by a prayer for sale for that pur-

pose. *Grigsby v. Barr*, 14 Bush (Ky.) 330.

Where a person has been brought from another State by force, or has been induced to come into this State by the fraud and deceit of another, for the purpose of procuring the service of a summons in a civil action, and personal service has been made under such circumstances, the service of process and return of the officer will be quashed on proper plea, where the facts are undisputed. *Blair v. Turtle*, 1 McCrary, 372. *S. P. Wood v. Wood*, 78 Ky., 624. But where a party legitimately and voluntarily comes within the territorial jurisdiction of the court, not having been induced to do so by fraud, trick, or device, the fact that access to him is by such means obtained, furnishes no ground for setting aside the service. *Atlantic &c. Teleg. Co. v. Baltimore &c. R. R. Co.*, 46 Superior (N. Y.), 377.

Where service of a summons by publication upon a non-resident defendant is ordered, a personal service out of the State is equally valid to give jurisdiction as if service had been made by publication and deposit in the post-office. *Jenkins v. Fahey*, 73 N. Y., 355, 360. In Vermont, however, where a court of chancery served process upon a party named as a defendant, in a cross-bill, by an order of the court, out of the State. *Held*, that said court did not acquire jurisdiction of said party, as such service was void. *Mercantile Trust Co. v. Lamaille Valley R. R. Co.*, 16 Blatchf., 324.

THIS case came up from the Circuit Court of the United States for Ohio, upon a certificate of division in opinion between the judges thereof.

It was an ejectment brought by Boswell, a citizen of Kentucky, against Rodolphus Dickinson and others, tenants in possession, to recover tract number seven in the United States reserve, of two miles square, at Lower Sandusky, in the State of Ohio. Dickinson having died, his heirs and representatives were now parties.

Before relating the proceedings in the ejectment, it is proper to notice some other occurrences which were prior in time.

In May, 1825, Thomas L. Hawkins filed a bill in the Sandusky Common Pleas, against Thomas E. Boswell, William T. Barry, and William Whitmore. The bill stated that all these parties were engaged, as partners, in building a saw-mill upon lot number nine; that they went on with the work until 1823; that he, Hawkins, was a creditor of the concern; that the other parties had obtained a title to two thirds of the lot, and refused to convey any part of it to the complainant. The bill then concludes thus:—"To the end, therefore, that said Boswell, Barry, and Whitmore may, under their corporeal oaths, true answers make to all matters herein charged, and on the final hearing of this cause your honors will decree that said defendants convey one fourth of the said land to which they have *obtained a legal title, and also to account [*337 to your orator for the money and time he has expended more than his share on said mill and the improvements of said land, and that notice be given defendants," &c.

It being made known that the defendants were non-residents of the State, but resided in the States of Kentucky and Massachusetts, notice of the pendency of the suit was published in the Western Statesman, a newspaper printed at Columbus, Ohio, for the term of nine weeks successively.

At May term, 1826, a decree was passed that the bill should be taken *pro confesso*, and a master was directed to take an account between the parties, who reported a balance due to Hawkins of \$1,844.17.

In July, 1826, the court passed a final decree, "that the complainant do recover of the said defendants the said sum of eighteen hundred forty-four dollars and seventeen cents, and his costs by him in this behalf expended. It is further ordered, adjudged, and decreed, that this decree shall, from the time of its being pronounced, have the force, operation, and effect of a judgment at law, and shall be a lien upon all the town lots of the defendants within said county, and also all the other real estate of the said defendants within said County

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of Sandusky, as security for the satisfaction of said decree; and it is further ordered, adjudged, and decreed, that, if the above sum of eighteen hundred forty-four dollars and seventeen cents, and the costs to be taxed in this suit, be not paid within thirty days from the date of this decree, upon a precipe being filed with the clerk of this court by the complainant or his solicitor, execution shall issue against the goods, chattels, lands, and tenements of the said defendants, which shall be taken in execution, and sold in like manner as though said execution issued on a judgment rendered in a court of law; and all further proceedings in this cause to be continued until the next term."

Under a *pluries fi. fa.*, lot number seven was sold, and in May, 1832, the sheriff made a deed of it to Sardis Birchard.

We can now return to the ejectment.

In the trial of it, Boswell, the plaintiff, produced a patent from the United States for the lot number seven, dated September 2, 1831, and also the following agreement of counsel.

"It is admitted, as evidence, in this case, that the plaintiff's lessor, said Thomas E. Boswell, now is, and ever since the year A. D., 1818 has been, a resident of the city of Lexington, County of Fayette, and State of Kentucky; that from the 1st *338] day of May, A. D., 1825, up to the 1st day of August, A. D., 1826, he was not within the State of Ohio, and that the premises in controversy in this case are of the value of ten thousand dollars.

"LANE, BUCKLAND, & HAYS,
Attorneys for Defendants.

Lower Sandusky, Ohio, August 31st, A. D., 1846."

The plaintiff there rested.

The defendants then offered in evidence a certified copy of the record of the proceedings of the Court of Common Pleas of Sandusky County, and also of the sheriff's deed, to the introduction of which, as evidence in the case, the plaintiff objected.

And thereupon, by consent of parties, the jury do say, that if, in the opinion of the court, the said record and sheriff's deed are by law admissible in evidence, then the said defendants are not guilty of the trespass and ejectment in the declaration mentioned; but if, in the opinion of the court, the said record and sheriff's deed are not admissible as evidence, then the jury say that the defendants are guilty of the trespass and ejectment in the declaration mentioned, and assess the plaintiff's damages at one cent; and thereupon the arguments of

counsel being heard, and due deliberation had, the opinions of the judges were divided on the following questions, to wit:—

1. Whether or not the proceedings and decree of the said Court of Common Pleas of Sandusky County, set forth in said record, are *coram non judice* and void.

2. Admitting said proceedings and decree to be valid so far as relates to the lands specifically described in the said bill in chancery, whether or not said proceedings and decree are *coram non judice* and void so far as relates to lot number seven, in controversy in this case, and which is not described in said bill in chancery; or, in other words, whether said proceedings and decree are not *in rem*, and so void and without effect as to the other lands sold under said decree.

And thereupon it is ordered, that said questions be certified for decision to the next term of the Supreme Court of the United States, according to the act of Congress in such case made and provided.

The cause was submitted on printed arguments by *Mr. Ewing*, for the plaintiff, and *Mr. Stanberry*, for the defendants. From these arguments it is only possible to give extracts.

**Mr. Ewing*, for the plaintiff.

The question is upon the process and the decree. [*339
If the process be not sufficient to bring the defendant into court and make him a party to the decree, where all the other proceedings are regular, the case cannot be improved by any conceivable amount of errors, irregularities, or discrepancies between the bill and the decree.

The decree is for a sum of money found due by a master upon reference, and it is for nothing else. The case, then, is precisely the same as if the bill had been filed for the recovery of that sum of money merely, and had named no other object; for the decree cannot be strengthened at all by errors and irregularities upon the record. I do not claim that it is weakened by those irregularities,—I merely say that it is not strengthened; it is no better than if the bill had exactly supported the decree.

Now, this personal decree for money against an absent defendant cannot be sustained on general principles of equity. It is *coram non judice*, if jurisdiction were not obtained by personal service; this is not and cannot be disputed. As a matter of general equity, then, independently of statutory regulation, this whole proceeding would be a nullity, and the sale under the decree void.

But the defendants attempt to sustain the proceeding under the chancery act of Ohio of 1824, and they copy in their brief, as bearing upon the case, the 1st, 7th, 12th, 13th, 16th, 38th, and 40th sections of that act.

The first section gives the Courts of Common Pleas general chancery jurisdiction in all cases properly cognizable in a court of chancery, that is, jurisdiction over the person, and through the person over property. This jurisdiction is obtained by personal service only.

The seventh section allows a petition to be filed against an absent person, where it is necessary to join him with a defendant residing in the State. This does not touch the case at bar. There was no defendant residing in the State.

Section twelfth is the one under which it was attempted to bring this case. It gives the court jurisdiction over the rights of absent defendants, upon notice, "in all cases properly cognizable in courts of equity, where either the title to, or boundaries of, land may come in question, or where a suit in chancery becomes necessary in order to obtain the rescission of a contract for the conveyance of land, or to compel the specific execution of such contract."

*340] This decree does not touch "the title to, or boundaries *of, land"; no decision is made on either in it. It does not relate to "the rescission of a contract for the conveyance of land," or to the compelling of "the specific execution of such contract"; not a word is said of either in it. This decree, then, does not belong to a case in which any other than personal service can bring the defendant into court; and if the decree be the test of jurisdiction, this case was *coram non judice*.

Where there is a plea to the jurisdiction of a court pending a cause, or a motion to dismiss for want of jurisdiction, there is of course no judgment or decision, and the case can be looked to only in its inceptive stages; but when the final judgment or decree has been rendered in a court, and the jurisdiction of that court, after its final action, is contested, it is the jurisdiction to render the judgment or to pronounce the decree which is in question,—not the jurisdiction to receive the declaration or the bill in chancery. It is the judgment or decree alone that can affect the rights of the absent party injuriously, not the intermediate proceedings; the bill cannot deprive him of any right, or involve him in any liability, but the decree may; the character of the decree, then, rather than of the bill, must determine the necessity of personal service. If in a suit at law the declaration be in trespass and the judgment in debt; or if, as in this case, the

bill was filed to compel the specific execution of a contract for the conveyance of land, and the decree is for a sum of money merely; it is the judgment in the one case, and the decree in the other, that the parties must abide by. The court which has to declare it valid, or void, will not look at the intermediate proceedings to see if they warranted the decree or judgment. If the court had jurisdiction to render such judgment or decree, it is binding and valid, no matter how irregular or erroneous the proceedings. If they had not jurisdiction to render the decree, no error or irregularity in the proceedings can help out the jurisdiction. This is a personal decree for the payment of money,—a decree to operate *in personam*; there is no provision in the chancery act of Ohio by which an absent defendant can be brought in to answer to a bill praying for such a decree. It will not, I think, be pretended, that, if an honest bill, and one direct to the purpose, had been filed, claiming merely a sum of money as a balance of partnership accounts, the jurisdiction could have been sustained. There could, indeed, be no pretence for sustaining it; and surely the decree is no better because it was obtained by an indirection.

But, strange as it may appear, this is the only ground on *which it is attempted to sustain the jurisdiction, the learned counsel on the other side seeming to consider [*341 the bill, and not the decree, the subject by which the jurisdiction is to be tested.

The very statement of the proposition is, to my mind, enough to expose its fallacy. The statute gives jurisdiction against a non-resident, when it is necessary to go into chancery to compel the specific execution of a contract for the conveyance of land. How is it to be ascertained that there was any such contract? By the decree, surely, finding it; not by the unsupported statements of the bill, abandoned as, in this case, by the complainant when he comes to take his decree. It would be monstrous to give the statute such a construction, as it would enable parties to defraud the law at pleasure. A complainant wishes to take an *ex parte* decree against a non-resident,—he has nothing to do but to file his bill, aver a contract for the conveyance of land which he wishes to have specially executed, add to it a claim for money paid, and take his decree for money, without troubling himself to prove that the defendant had land at all in the State. It would be a regular mode of bringing parties into court without notice, and obtaining decrees against them without allowing them a knowledge of the fact that they were in court. Out of a construction like this, aided by a reasonable

mixture of fraud and perjury, a practice would grow up which would enable the merest vagabond to possess himself of the estate of any non-resident whose wealth might be to his fancy.

Indeed, the party need not always put himself to the trouble or incur the hazard of perjury. In this case the complainant got along very well without it, as he was not required to adduce any testimony of his claim, or make an affidavit to its truth; and such might be the case nine times out of ten, if a bill could be filed in the Court of Common Pleas in Ohio against a defendant in Massachusetts on a false suggestion, and a decree rendered against him on notice published in a country newspaper; especially if the case were conducted by counsel who would take care to enter his decree in the absence of the president judge.

The object of the chancery act of 1824 undoubtedly was to provide for a proceeding *in rem*, when a contract had been made touching land lying within the State, that the title thereto should be settled by either of the parties to the contract without going into another jurisdiction. It never was intended to create thereby a fictitious process by which parties were to be made personally amenable to the jurisdiction of a court of whose proceedings, or even existence, they had never heard. *The act will not bear any such construction, and it would be against natural justice so to construe it.

This is not a case of local concernment, in which the decision of the courts of the State are of binding authority; and, though land is involved in the case, it is not a question of title in the ordinary acceptation of the term, but one of more extensive application. If this decree be valid for the present purpose, it is so for all purposes, and full force and effect must be given it in all the courts of the United States. Nor does the Supreme Court of Ohio, in the case of the *Lessee of Boswell v. Sharp and Leppelman* (set out at large in defendants' argument), give, or profess to give, a construction to the chancery act of Ohio, by which, upon sound and logical reasoning, this decree can be sustained as a personal decree. The learned judge who delivers the opinion in that case says expressly (page 25), that if the demand was simply personal, and the decree was pronounced without service upon the defendants, who resided in another State, the objection to the jurisdiction would have been well taken. He thus disembarasses himself and us of the construction of the statute, and rests the case upon a general proposition, universal in its application if sound, and if unsound to be universally rejected.

It is, that the statement of the bill, and not the substance of the decree, is the test to settle the question of jurisdiction. On this we take issue. We say it matters not what is demanded in the bill; if the decree be merely personal, it must be supported by personal service, and cannot be helped by a bill claiming land.

The statute of Ohio admits the general principle, that a court of chancery cannot take jurisdiction of a person without personal service made on him within the jurisdiction of the court; but provides that, where land lies within the jurisdiction of the court, it may be acted upon, and the title to it settled, in proper cases, by a proceeding in chancery, though one of the parties be a non-resident,—just as laws relating to foreign attachments allow land or personal property to be seized at law, and a judgment rendered against it for the payment of a common law debt. But in both these cases, though the proceeding is in the name of the owner of the property, it is substantially a proceeding *in rem*, and the judgment or decree can bind only the thing, not the person.

(The counsel then quoted Story, Conf. Laws, pages 461–465, 549; 2 McLean, 514; 5 Paige (N. Y.), 302; 15 Ohio, 442; 8 Paige (N. Y.), 444.)

The following are extracts from *Mr. Stanberry's* argument, in reply.

*In the argument of Mr. Ewing, counsel for the plaintiff, the question is stated to be, whether the decree is void,—and a nice distinction is taken between the validity of the proceedings up to the decree and the decree itself. But no such question is before this court. We can only look to the very question upon which the court below was divided in opinion, and that is specifically stated to be, whether the proceedings and decree are void. No one can say whether the judges of the court below would have differed as to the validity of the decree, if they had concurred as to the validity of the proceedings. The answer to be sent to them by this court cannot divide the question or limit it. The question here is precisely what it was before the judges below,—Are the proceedings and decree void? Void as a whole or an entirety.

It is proper, however, to consider this question in the relation in which it arises, and not in the abstract. The proceedings and decree are of a court in the State of Ohio, and the question as to their validity arises upon a title to land within the same State, depending upon them. This narrows the

question of validity, and excludes all inquiry as to extraterritorial effect,—a very important limitation.

With these preliminary remarks, I shall proceed to reply to the argument of Mr. Ewing. The learned counsel first states that the question which arises is, whether the defendants, in the case before the Sandusky Common Pleas, were in court, so that a personal decree could be rendered against them. Again, the question is stated to be upon the process and decree; and, lastly, it is stated that it is the decree alone which gives character to the whole case.

I do not understand Mr. Ewing to argue that the case made by the bill was not a proper case for the jurisdiction of the court, under the twelfth section of the act of 1824. Indeed, no question can be made upon that. It was a case properly cognizable in a court of equity, involving the execution of a contract for the conveyance of land within the jurisdiction of the court. It was therefore precisely within a class of cases provided for in that section, and, upon the publication of the notice to the non-resident defendants, the jurisdiction of the court fully attached.

But it is argued that all this goes for nothing, inasmuch as the decree was not strictly according to the case made in the bill; that the case made in the bill was a case *in rem*, whereas the decree was exclusively *in personam*.

In the first place, I answer to this, that the case made by the bill is not at all a case *in rem*, nor does the twelfth section of the act of 1824 enumerate a single case of that character.

*344] *In Hollingsworth v. Barbour*, 4 Pet., 475, the point was made that a bill for a specific performance was a proceeding *in rem*. The opinion of Mr. Justice Trimble in the court below, which was adopted by this court in that case, goes directly to that point, and is as follows:—"The case under consideration is not properly a proceeding *in rem*; and a decree in chancery for the conveyance of land has never yet, within my knowledge, been held to come within the principle of proceedings *in rem*, so far as to dispense with the service of process on the party. There is no seizure nor taking into the custody of the court the land, so far as to dispense with the service of process on the party; constructive notice, therefore, can only exist in the cases coming fairly within the provisions of the statutes authorizing the court to make orders of publication, and providing that the publication, when made, shall authorize the court to decree."

All that can be said of the case made by the bill, and of

the cases enumerated in the twelfth section, is, that they relate to contracts or questions affecting land situate within the State. They cover a vast field of equity jurisdiction, which has never been held to be a jurisdiction *in rem*. Unlike the proceedings *in rem*, there is no seizure and condemnation of the property in the first instance, and the relief administered may very properly go beyond the property which is the subject of the contract.

There is not a subject for jurisdiction enumerated in the twelfth section, in which the decree may not properly and necessarily be a decree for money. Take, for instance, the subject of the rescission of a contract for the conveyance of land, and suppose the plaintiff to be the purchaser, who alleges the contract, the payment of all money due upon it, and a ground for rescission. In such a case, if the allegations be found for the plaintiff, the necessary decree is for the repayment of the money, as well as the cancellation of the contract. Any thing short of that stops short of the true meaning of rescission.

Take, also, the subject of the specific execution of such a contract, and suppose the bill to be filed by the vendor, who has never received one cent of the purchase-money. What other execution or performance of the contract can there be in such a case, but the payment of the purchase-money, or a decree for such payment?

Such a construction can never be put on this statute as to say, that these subjects for jurisdiction, so brought within the cognizance of a court of equity, are to be dealt with in any other way than according to the necessities of the case, and the *usual relief administered in equity. If there were any doubt as to this, the express language of the section settles it. The concluding clause is in these words:—
 “Such court is hereby authorized to take cognizance thereof, and direct either personal notice, or notice by publication, of its pendency, to be given as in this act provided, and on proof of such notice having been given, to proceed as in other cases.”

A proceeding or case in equity under this statute may then properly terminate in a decree for money; that is, it is within the competence of the court to render such a decree, though it sound *in personam*, without committing so much as an error.

I do not understand Mr. Ewing to contend that a statute which should provide for constructive notice by publication, as the foundation for a judgment or decree for money, would be void, or that the judgment or decree rendered upon such

notice would be a nullity. The argument is, that this statute authorized no such proceeding, and warranted no such decree.

A judgment or decree rendered in such a proceeding is valid within the State, and may be carried into effect upon the property of the defendant, real or personal, found within the State. The most that can be said against it is, that it shall not be allowed to have an extraterritorial effect. It is not strictly a judgment or decree *in personam*, but, as to its effect, is limited to the property of the debtor within the local jurisdiction.

The jurisdiction of a court of chancery over persons out of the reach of its process is founded either upon the inherent power of a court or upon positive statute. In England, as well as in various States of the Union, such jurisdiction is constantly exercised, either by a substituted and formal service of subpoena upon some officer of the court, or by publication. Nor is this jurisdiction at all confined to cases involving the title to lands within the particular sovereignty, but it extends to matters strictly *in personam*.

But we are not obliged to sustain such a statute, or such a proceeding, in this case. So far as the statute is concerned, there can be no question of its validity; and so far as the proceedings are concerned, there is no question, they were exactly authorized by the statute. We have gone a step further than was necessary, and have argued the question of jurisdiction as if it depended on the decree. That is the ground taken in the argument for the plaintiff. We deny its soundness.

If the proceeding, that is to say, the bill and the publication, were in conformity with the statute, the question of jurisdiction is settled. It is impossible to contend, that, after proof of publication upon the bill, the court had not jurisdiction. The case *made by the bill was precisely one of *346] the cases provided for in the statute, and the publication of notice was in all respects correct. When, then, was the case *coram judice*? Certainly, upon proof of publication, if not before. Then, how can it be said that afterwards it came to be *coram non*? If it were before the court upon the publication, it continued to be before the court until the end of the case. The decree was in the very case, between the very parties to the bill and publication, and upon the very contract set out in the bill. All the safeguards and requirements of the law, to prevent an assumption of jurisdiction, had been fulfilled. The case was brought precisely

to the point at which the court is intrusted with the rights of the parties litigant.

Now, the most that can be said against the decree is, that it did not fully cover the whole case made by the bill. It does not distinctly decree a conveyance of the fourth of the land to the plaintiff, Hawkins. To have done full justice, and to have settled all the equities which grew out of the contract, that should have been done with more certainty. But if that alone had been decreed, it would not have settled all the equities, or decided the whole case. For the contract did not merely contemplate such conveyance, but contemplated also remuneration to Hawkins for services and advances, stipulated for as one term of the contract, and to be rendered and made, in reference to the land.

Mr. Justice McLEAN delivered the opinion of the court.

This case is before us on points certified, on which the opinions of the judges of the Circuit Court of the United States for Ohio were opposed.

In 1825, a bill was filed by Thomas L. Hawkins, in the Court of Common Pleas for Sandusky County, Ohio, against Thomas E. Boswell and others, which represented that, in the year 1816, Boswell, of the State of Kentucky, the complainant, Reed, and Owings agreed to build a saw-mill on the public land, with the view of purchasing the land when sold by the government. Boswell and Owings advanced a part of the money; the complainant was to be the active partner, and his share of the capital was to be paid by labor. That he expended labor and money until the land was sold, in 1818, at Wooster, in Ohio, when Reed and Owings abandoned the contract; and it was then agreed by Boswell, William T. Barry, of Kentucky, and William Whitmore, of Boston, and the complainant, to go on and purchase lot number nine, or a large part of it, on which the building for the mill had been commenced. The *purchase was made, and it was [*347 agreed that the complainant's share of the purchase-money should be paid in labor on the mill, and in improvements on the land. That he should be the active partner, &c.

The complainant proceeded in the construction of the mill, and expended for the company the sum of five thousand dollars, of which he advanced two thousand six hundred dollars, besides his own time; that the complainant expected his partners would have conveyed to him one fourth of the land purchased, they having obtained a legal title to two thirds of the lot, but that they have refused to do the same, or to account

and refund him the money expended, &c. And the complainant prayed a decree for one fourth part of the land to which the defendants have obtained a title, and also that they may account, &c.

The defendants being non-residents of Ohio, the court ordered nine weeks' notice to be given in a newspaper, as the statute requires. There being no appearance of the defendants, the bill was taken as confessed, and the matter was referred to a master, who reported a balance against them, and in favor of the complainant, of the sum of eighteen hundred and forty-four dollars and seventeen cents, for which a final decree was entered, and it was adjudged that it should have, from the time of its being pronounced, the operation and effect of a judgment at law, and be a lien on all the town lots of the defendants, and all other real estate owned by them within the county. And execution was authorized, &c. Several executions were issued and a number of lots were sold, among others lot number seven, containing seventy-seven acres and seventy-five hundredths, for which the sheriff's deed was executed.

For this lot number seven, an ejectment was brought by Boswell in the Circuit Court of the United States, and issue being joined, on the trial the following questions were raised, on which the opinions of the judges were opposed.

"1. Whether or not the proceedings and decree of the said Court of Common Pleas of Sandusky County, set forth in the record above stated, are *coram non judice*.

"2. Admitting said proceedings and decree to be valid so far as relates to the land specifically described in the said bill in chancery, whether or not said proceedings and decree are *coram non judice* and void so far as relates to lot number seven, in controversy in this case, and which is not described in said bill in chancery; or, in other words, whether said proceedings and decree are not *in rem*, and so void and without effect as to the other lands sold under said decree."

*348] "As the title to lot number seven only is involved in the ejectment suit, it is unnecessary to consider the first point certified. Under the decree, which was only for money, many lots were sold by the sheriff that are still held, it is presumed, under his deed; but the holders are not parties to this suit, and it may be decided without affecting their interests.

When the record of a judgment is brought before the court collaterally or otherwise, it is always proper to inquire whether the court rendering the judgment had jurisdiction. Jurisdiction is acquired in one of two modes;—first, as against the

person of the defendant, by the service of process; or secondly, by a procedure against the property of the defendant, within the jurisdiction of the court. In the latter case the defendant is not personally bound by the judgment, beyond the property in question. And it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be, substantially, a proceeding *in rem*. A bill for the specific execution of a contract to convey real estate is not strictly a proceeding *in rem*, in ordinary cases; but where such a procedure is authorized by statute, on publication, without personal service of process, it is, substantially, of that character.

The chancery act of Ohio of 1824 confers on the Court of Common Pleas general chancery powers. In the twelfth section, jurisdiction is given over the rights of absent defendants, on the publication of notice, "in all cases properly cognizable in courts of equity, where either the title to, or boundaries of, land may come in question, or where a suit in chancery becomes necessary in order to obtain the rescission of a contract for the conveyance of land, or to compel the specific execution of such contract."

Under this statute the bill by Hawkins purports to have been filed. But without reference to the other lots sold under the decree, there is no pretence to say that the bill had any relation to the title or boundaries of lot number seven, or to any contract for the conveyance of the same. And it is only in these cases that the act authorizes a chancery proceeding against the land of non-residents by giving public notice. It is a special and limited jurisdiction, and cannot be legally exercised, except within the provisions of the statute.

The principle is admitted, that, where jurisdiction is acquired against the person by the service of process or by a voluntary appearance, a court of general jurisdiction will settle the matter in controversy between the parties. But this principle does not apply to a special jurisdiction authorized by statute, though *exercised by a court of general jurisdiction. The present case will illustrate this [*349 view. Admit that a special jurisdiction was acquired against all the other lots, yet number seven was in no way connected with them. It was not named in the bill, nor was there any step taken in relation to it, until it was levied on by the sheriff to satisfy the general decree. It was not within any one of the categories named in the statute. Until long after the decree, the title to it was not obtained by defendants. If it can be made subject to such a procedure, then the special

jurisdiction given by the statute is converted, by construction, into a general proceeding against the property of non-residents by a mere publication of notice.

The property of an individual is subject, in a certain sense, to the law of the State in which it is situated. It is liable for taxes and to such special proceedings against it as the law shall authorize. An attachment may be laid upon it, and it may be sold in satisfaction of an established claim. And the legislature may, perhaps, subject other lands to the payment of the judgment on the attachment after the sale of the lands first attached. But no such proceeding is authorized by the act under which this procedure was had. It is limited to the cases enumerated in the statute.

It is said that the statute authorizes a decree for money. This may be admitted. Under the rescission of a contract the money paid may be decreed to be refunded, and the land covered by the contract, being within the special jurisdiction of the court, may be ordered to be sold. But the power of the court is limited to this. Under the assumption of a special power, it cannot be made general by any supposed necessity, beyond the provisions of the act. Such a construction would not only pervert the object of the legislature, but it would sacrifice the property of an individual without notice in fact, and who had no opportunity to make his defence.

The proceedings in this case are a practical commentary upon this construction.

It is said, if this construction of the act be erroneous, it does not make void the proceedings, and that the error can only be corrected by an appellate court. And we are referred to the case of *Lessee of Boswell and others v. Sharp and Lepelman*, 15 Ohio, 447, in which it is alleged that the Supreme Court of Ohio sustained the decision of the Common Pleas on the question now before us.

In that case the Supreme Court did hold that the Court of Common Pleas of Sandusky had jurisdiction in the chancery proceeding, and that the validity of the same could not be *350] questioned collaterally. But that decision was made in reference to a part of lot number nine, on which the mill was constructed, and to obtain a title for a part of which the bill was filed. The title to lot number seven was not involved in the case before the Supreme Court, and, consequently, they did not consider it.

It may be difficult in some cases to draw the line of jurisdiction so as to determine whether the proceedings of a court are void or only erroneous. And in such cases every intendment should be favorable to a purchaser at a judicial sale.

But the rights of all parties must be regarded. No principle is more vital to the administration of justice, than that no man shall be condemned in his person or property without notice, and an opportunity to make his defence.¹ And every departure from this fundamental rule, by a proceeding *in rem*, in which a publication of notice is substituted for a service on the party, should be subjected to a strict legal scrutiny. Jurisdiction is not to be assumed and exercised in such cases upon the general ground, that the subject-matter of the suit is within the power of the court. This would dispense with the forms of the law, prescribed by the legislature, for the security of absent parties. The inquiry should be, have the requisites of the statute been complied with, so as to subject the property in controversy to the judgment of the court, and is such judgment limited to the property named in the bill. If this cannot be answered in the affirmative, the proceedings of the court beyond their jurisdiction are void.²

If this test be applied to the proceedings before us, we think in no just and legal sense can they be held to subject lot number seven to the decree of the court, nor to fix any personal liability on the defendants, and consequently, that the levy and sale of the sheriff were without authority and void, and the second question certified to this court must be so answered.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Ohio, and on the points or questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel. On consideration whereof, it is the opinion of this court, that the proceedings and decree of the Court of Common Pleas of Sandusky County, as set forth in the record, are *coram non judice* and void, so far as relates to lot number *seven, and consequently that the levy [*351 and sale of the sheriff were without authority and void. Whereupon it is now here ordered and adjudged by this court, that it be so certified to the said Circuit Court.

¹ QUOTED. *Lavin v. Emigrant Indust. Savings Bank*, 18 Blatchf., 20. 233; *Ray v. Norseworthy*, 23 Id., 136; *Earle et al. v. McVeigh*, 1 Otto, 510.

² CITED. *Baldwin v. Hale*, 1 Wall.,

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THE UNITED STATES v. EPHRAIM BRIGGS.

On the 2d of March, 1831, Congress passed an act (4 Statutes at Large, 472), entitled "An act to provide for the punishment of offences committed in cutting, destroying, or removing live-oak or other timber or trees, reserved for naval purposes."

The act itself declares, that every person who shall remove, &c., any live-oak or red-cedar trees, or other timber, from any other lands of the United States, shall be punished by fine and imprisonment.

The title of the act would indicate that timber reserved for naval purposes was meant to be protected by this mode, and none other. But the enacting clause is general, and therefore cutting and using of oak and hickory, or any other description of timber trees from the public lands, is indictable, and punishable by fine and imprisonment.¹

THIS case came up from the Circuit Court of the United States for Michigan, upon a certificate of division in opinion between the judges thereof. It was before the court, and reported in 5 How., 208, and sent back because the point was not distinctly certified.

On the 2d of March, 1831, Congress passed the following act (4 Stat. at L., 472):—

"An Act to provide for the punishment of offences committed in cutting, destroying, or removing live-oak or other timber or trees, reserved for naval purposes.

"Sec. 1. That if any person or persons shall cut, or cause or procure to be cut, or aid, assist, or be employed in cutting, or shall wantonly destroy, or cause or procure to be wantonly destroyed, or aid, assist, or be employed in wantonly destroying, any live-oak or red-cedar tree or trees, or other timber, standing, growing, or being on any lands of the United States, which, in pursuance of any law passed or hereafter to be passed, shall have been reserved or purchased for the use of the United States, for supplying or furnishing therefrom timber for the navy of the United States; or if any person or persons shall remove, or cause or procure to be removed, or aid or assist or be employed in removing, from any such lands which shall have been reserved or purchased as aforesaid, any live-oak or red-cedar tree or trees, or other timber, unless duly authorized so to do by order in writing of a competent officer, and for the use of the navy of the United States; or if any person or persons shall cut, or cause or procure to be cut, or aid or assist or be employed

¹ See U. S. Rev. Stat., § 5388; also *Shuler*, 6 Id., 28; *Same v. Darton*, Id., *United States v. Reddy*, 6 McLean, 358; 46; *Same v. Thompson*, Id., 56; *Same v. Murray*, Id., 207; *Same v. Potter*, Id., 186.

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in cutting, any live-oak or red-cedar tree or trees, or other timber on, or shall remove, or cause or procure to be removed, or aid or assist or be employed in removing, any live-oak or red-cedar trees, or other timber, from any other lands of the United States, acquired or to be hereafter acquired, with intent to export, dispose of, use, or employ the same in any manner whatsoever, other than for the use of the navy of the United States; every such person or persons so offending, on conviction thereof before any court having competent jurisdiction, shall, for every such offence, pay a fine not less than triple the value of the tree or trees or timber so cut, destroyed, or removed, and shall be imprisoned not exceeding twelve months.

"Sec. 2. That if the master, owner, or consignee of any ship or vessel shall knowingly take on board any timber cut on lands which shall have been reserved or purchased as aforesaid, without proper authority, and for the use of the navy of the United States; or shall take on board any live-oak or red-cedar timber cut on any other lands of the United States, with the intent to transport the same to any port or place within the United States, or to export the same to any foreign country, the ship or vessel on board of which the same shall be taken, transported, or seized, shall, with her tackle, apparel, and furniture, be wholly forfeited to the United States, and the captain or master of such ship or vessel wherein the same shall have been exported to any foreign country, against the provisions of this act, shall forfeit and pay to the United States a sum not exceeding one thousand dollars.

"Sec. 3. That all penalties and forfeitures incurred under the provisions of this act shall be sued for, recovered, and distributed and accounted for, under the directions of the Secretary of the Navy, and shall be paid over, one half to the informer or informers, if any, or captors where seized, and the other half to the Commissioners of the Navy Pension Fund for the use of the said fund; and the commissioners of the said fund are hereby authorized to mitigate in whole or in part, and on such terms and conditions as they shall deem proper, and order in writing, any fine, penalty, or forfeiture incurred under this act."

In June, 1846, the grand jury of the United States in Michigan indicted Ephraim Briggs for entering upon the public lands and cutting twenty white-oak trees and twenty hickory trees, &c.

The defendant at first demurred, but afterwards pleaded

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*353] not *guilty, and the case went to trial. The jury found him guilty. The defendant then moved in arrest of judgment, and to set aside the verdict, for the following reasons:—

First. Because the facts set forth in the indictment in this cause do not constitute a criminal offence, punishable by indictment, under the statutes of the United States.

Second. Because, under the statutes of the United States, trespass on the public lands, by cutting timber thereon, is in no case an offence punishable criminally by indictment, but is a mere civil trespass, and as such punishable only by action of trespass at common law, or debt on the statute.

Third. Because the said indictment does not aver, nor was there any evidence to show, that the lands on which said timber was cut was reserved or set apart for naval purposes, according to the provisions of the statutes of the United States.

Fourth. Because there was no proof on the trial of the said cause that the timber cut consisted of live-oak or red-cedar trees, nor is there any averment in said indictment that any such trees were cut on the lands described in said indictment.

Fifth. Because such verdict is contrary to evidence and the charge of the court.

Division of Opinion.

“THE UNITED STATES OF AMERICA v. EPHRAIM BRIGGS.

“The motion of defendant in arrest of judgment, and for a new trial in the case, coming on to be heard, and the same having been argued by counsel on either side, the opinions of the court were opposed as to the point, ‘whether the offence charged and set forth in the indictment, of cutting, removing, or using for any other than naval purposes, any trees or timber standing, growing, or being on any lands belonging to the United States, whether reserved for naval purposes or not, is, under the statutes of the United States, an indictable offence, and punishable by fine and imprisonment.’

“And it is ordered and directed, that this cause be certified to the Supreme Court of the United States on the indictment and trial, and the motion in arrest of judgment and for a new trial in the case, in pursuance of the act of Congress in such case made and provided.”

The case was argued for the United States by *Mr. John*

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son (Attorney-General), no counsel appearing for the defendant. He contended,—

1. That the said acts constitute an offence within the meaning of the act of 2d March, 1831, because it does embrace the *cutting, &c., of timber from other lands belonging to the United States than those reserved for [*354 naval purposes.

2. That it is an offence for which an indictment is a proper remedy, and the party punishable by fine and imprisonment.

“Wherever a statute prohibits a matter of public grievance, acts done contrary to it are misdemeanours at common law, and as such punishable by indictment, unless the statute expressly or impliedly excludes that remedy; and as to this, it is immaterial whether the statute imposes a particular penalty for the offence or not, or whether such penalty is embraced in the same statute, or a subsequent one.” 2 Hawk., ch. 25, § 4; *King v. Davis*, Say., 163; *Rex v. Boyall*, 2 Burr., 832; *Rex v. Harris*, 4 T. R., 205; *King v. Sainsbury*, Id., 457; *Rex v. Wright*, 1 Burr., 543.

Mr. Justice CATRON delivered the opinion of the court.

The defendant below was indicted for cutting, with intent to appropriate to his own use, twenty white-oak trees and twenty hickory trees of the United States standing on the public lands. The jury found him guilty, and he moved in arrest of judgment, because the offence charged was not punishable by indictment; on which motion, the Circuit Court certify to this court as follows:—

“The motion of defendant in arrest of judgment, and for a new trial in the case, coming on to be heard, and the same having been argued by counsel on either side, the opinions of the court were opposed as to the point, ‘whether the offence charged and set forth in the indictment, of cutting, removing, or using for any other than naval purposes, any trees or timber standing, growing, or being on any lands belonging to the United States, whether reserved for naval purposes or not, is, under the statutes of the United States, an indictable offence, and punishable by fine and imprisonment.’”

The case presented for our examination involves a true construction of the act of 2d March, 1831. By that act, any person, who shall cut and appropriate live-oak or red-cedar trees reserved for naval purposes, is clearly indictable, and, on conviction, may be fined and imprisoned. We do not understand this to be controverted. But the question here is, whether the term “or other timber” imposes the same penalty on those who cut other timbers, such as oak or

hickory trees. It is insisted by the reasons in arrest, that the only object of the act was to protect, by stringent penalties, timbers suited to ship-building and naval purposes, and which had been reserved for such public use; and that it is *355] apparent from the act none other *were contemplated by Congress, as subject to protection and within the description, but live-oak and red-cedar.

To which it is answered, on the part of the United States:—

“1. That the said acts constitute an offence within the meaning of the act of 2d March, 1831, because it does embrace the cutting, &c., of timber from other lands belonging to the United States than those reserved for naval purposes.

“2. That it is an offence for which an indictment is the proper remedy, and the party punishable by fine and imprisonment.”

The caption of the act would indicate that timber reserved for naval purposes was meant to be protected by this mode, and none other. But the enacting clause is general, and not restricted to live-oak or red-cedar, nor to timber specially reserved for naval purposes; and therefore cutting and using oak and hickory trees is indictable; and so the cutting and using of any other description of timber trees from the public lands would be equally indictable; and being so, the punishment by fine and imprisonment must follow in all cases,—and thus we answer to the Circuit Court.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Michigan, and on the point or question on which the judges of the said Circuit Court were opposed in opinion, and which was certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel. On consideration whereof, it is the opinion of this court, that the offence charged and set forth in the indictment in this cause, of cutting, removing, or using, for any other than naval purposes, any trees or timber standing, growing, or being on any lands belonging to the United States, whether reserved for naval purposes or not, is, under the statutes of the United States, an indictable offence, and punishable by fine and imprisonment; whereupon, it is now here ordered and adjudged by this court, that it be so certified to the said Circuit Court.

*GEORGE S. GAINES, FRANCIS S. LYON AND HIS WIFE, SARAH LYON, JAMES M. DAVENPORT AND HIS WIFE, ALETHAN DAVENPORT, GOODMAN G. GRIFFIN AND HIS WIFE, WILLEY ANN GRIFFIN, GEORGE FREDERICK GLOVER, ANN GAINES GLOVER, LOUISA DAVENPORT GLOVER, MARY THOMPSON, AND MARY A. GLOVER, APPELLANTS, v. ISAAC W. NICHOLSON, POWHATAN B. THERMOND, LEWIS B. BARNES, JOHN T. MOSELEY, S. M. GOODE, AND JOHN HILMAN. [*356]

Whilst an ejectment suit was pending to try the legal title to a tract of land in Mississippi, the defendants filed a bill on the equity side of the court, praying for a perpetual injunction, upon the ground that the plaintiffs had obtained a patent from the United States by fraud and misrepresentation. But the fraud is not established by the evidence, and therefore the bill must be dismissed, and the parties remitted to the trial at law.

Where there are reservations, in Indian treaties, of specific tracts of land, which are afterwards found to be the sections set apart for school purposes, under a general law, the reservees have the better title. They hold under the original Indian title which the United States confirmed in the treaty. But where the reservee claimed under a float, no specific tract of land being designated for him in the treaty, this court abstains from expressing an opinion, that being the legal question pending in the court below.¹

THIS was an appeal from the Circuit Court of the United States for the Southern District of Mississippi.

It was an appeal from a decree by the equity side of the court, granting a perpetual injunction upon the appellants, who were plaintiffs in an ejectment suit then pending on the law side of the court.

In the second article of the supplement of Dancing Rabbit Creek treaty (7 Stat. at L., 340), made on the 27th of September, 1830, there is this reservation:—"Also, one section is allowed to the following persons, to wit, Middleton Mackey, Wesley Train, Choclehomo, Moses Foster, D. W. Wall, &c., to be located in entire sections, to include their present residence and improvement, with the exception of Molly Nail and Susan Colbert, who are authorized to locate theirs on any unimproved unoccupied land."

On the 27th of August, 1832, D. W. Wall, one of the reservees, assigned all his right and title under the treaty to George S. Gaines and Allen Glover, who procured a patent for the sixteenth section to be issued to them, in pursuance of this claim under the treaty, by the President, on the 7th of December, 1838.

¹ RELIED ON. *Trustees of Vincennes University v. State of Indiana*, 14 How., 280. CITED. *Cooper v. Roberts*, 18 How., 179.

Gaines et al. v. Nicholson et al.

In the year 1841, George S. Gaines, Francis S. Lyon, and the heirs at law of Allen Glover, instituted an ejectment against John Hilman, who was the tenant in possession under the trustees of the school lands.

*357] *In 1842 these trustees filed a bill on the equity side of the court, from which the following are extracts:—

“Humbly complaining, your orators would respectfully show unto your Honors, that your orators, Isaac W. Nicholson, Powhatan B. Thermond, Lewis B. Barnes, John T. Moseley, and S. M. Goode, are the trustees of the schools and school lands reserved by the acts of Congress for the use of schools in township twelve, range eighteen east, situated in the County of Kemper, in the State of Mississippi. They would further show unto your Honors, that section sixteen, in said township twelve, range eighteen east, was reserved, by the acts of Congress, for the use of schools in said township, and, being so reserved, your orators took possession of the same, and leased it to your orator, John Hilman, who went into possession of said tract of land prior to the 27th day of March, 1841, and has continued in possession ever since until this time.

“Your orators would further show unto your Honors, that on the 27th day of March, in the year 1841, an action of ejectment was instituted, on the law side of this honorable court, by John Doe, lessee of George S. Gaines and Francis S. Lyon, and of the heirs at law of Allen Glover, deceased, against your orator, John Hilman, for the recovery of said section sixteen, and to dispossess and eject your orators therefrom, which suit is still pending undetermined in said court.

“Your orators would further show unto your Honors, that by virtue of the second article of the supplement of Dancing Rabbit Creek Treaty, entered into on the 27th day of September, 1830, between the United States and the Choctaw tribe of Indians, certain portions of land, situated within the Territory ceded by the said Indians to the United States, were reserved to divers members of said tribe of Indians, and, amongst others, a section of land was reserved to David W. Wall, in the following words, to wit:—‘Also, one section is allowed to the following persons, to wit, Middleton Mackey, Wesley Train, Choclehomo, Moses Foster, D. W. Wall, &c., to be located in entire sections, to include their present residence and improvement, with the exception of Molly Nail and Susan Colbert, who are authorized to locate theirs on any unimproved unoccupied land.’

“Your orators would further show unto your Honors, that

on the 27th day of August, in the year 1832, the said David W. Wall, by deed of that date, bargained, sold, and conveyed, to George S. Gaines and Allen Glover, all the right, title, interest, and claim of him, the said David W. Wall, in and to a certain reservation of one section or six hundred and fifty acres *of land, made and granted to him, the said David W. Wall, under and by virtue of the provisions [*358 of a treaty made and concluded between the United States of America, and the Choctaw tribe of Indians, at a place called Dancing Rabbit Creek, in said nation, in the month of September, 1830.

"Your orators would further show unto your Honors, that the said George S. Gaines and Allen Glover, deceased, falsely and fraudulently pretending and representing to the President of the United States that the said David W. Wall, at the date of said treaty, resided upon said section sixteen, in the township and range aforesaid, and had his improvement thereupon, and that they had located the reservation of said Wall upon the same on the 7th day of December, in the year 1838, procured a patent to be issued to them, conveying to them the said section sixteen, in township twelve, range eighteen east.

"Your orators would further show unto your Honors, that at the date of said treaty the said David W. Wall did not reside, nor had he any improvement, upon said section sixteen, as aforesaid, but resided at a long distance from the same, and had no right or title, claim or interest whatever, in said section of land, which had been reserved, as your orators distinctly and positively aver, for the use of schools in the State of Mississippi, by the laws of the United States.

"Your orators would further show to your Honors, that the said Gaines and Glover were so well aware that they had no right to the said section of land, by virtue of their purchase from the said Wall, that they located the claim of said Wall at one time, as your orators have been informed and believe, upon another section of land near Mayhew, in Oktibbeha County, but finding that their claim to said last-named section would be disputed, they, in the technical language of land-mongers and speculators, lifted the same, and laid it upon said section sixteen. Your orators would further show unto your Honors, that, by virtue of the patent thus falsely and fraudulently obtained, they have been advised that the said Gaines and Allen Glover, deceased, obtained the highest and best legal title to said section sixteen, when, in equity and justice, they have no title thereto, but the same belongs

to your orators, as trustees and tenant of the schools and school lands, as aforesaid."

The bill then proceeded with the usual interrogatories, prayed for a temporary injunction, and afterwards a perpetual one.

A temporary injunction was granted.

The respondents, in their answer, set forth the circumstances of the treaty, averred that the United States were incapable of *making any grant of land which was reserved by the treaty, and denied the alleged fraud in the following manner:—

"These respondents, further answering, say that the said George S. Gaines and Allen Glover, deceased, never did, jointly, nor did either of them severally or separately, falsely pretend and represent to the President of the United States that the said David W. Wall, at the date of the treaty, resided upon section sixteen, in the township and range aforesaid, and had his improvement thereupon; no such pretence was ever set up or representation made to the President of the United States, or any one else, by the said George S. Gaines, or Allen Glover, in his lifetime, or either of them. A reference to the record of the executive department of the government, or even to the published documents relating to the public lands, would have relieved the complainants from an allegation so utterly false and unfounded."

To this answer there was a general replication.

Some testimony was taken bearing upon the points of Wall's residence, age, &c., but none touching the fraudulent representations alleged to have been made in the procurement of the patent.

On the 18th of November, 1845, the Circuit Court passed the following decree.

"Be it remembered, that this cause came on to be heard at the present term, before the Honorable Samuel J. Gholson, judge, &c., presiding, upon the bill, answers, exhibits, agreements, and proof in the cause, and upon argument on both sides; and now, at this day, the court being sufficiently advised, and because it appears to the satisfaction of the court that the complainants are entitled to the relief prayed for by them, it is therefore ordered, adjudged, and decreed, and the court doth hereby order, adjudge, and decree, that the judgment at law in the pleadings mentioned, and all attempts to enforce the same, be, and the same is hereby, perpetually enjoined; and, also, that the said defendants be, and they are hereby, perpetually enjoined from ejecting and turning out, or from commencing any other or further suit to eject and

turn the said complainants, or their successors in office, out of the possession of the section of land in the pleadings mentioned, to wit, section sixteen, in township twelve, range eighteen east, in Kemper County. It is further ordered, adjudged, and decreed, and the court doth hereby order, adjudge, and decree, that the defendants shall, within sixty days from the date of this decree, by deed, in fee simple, without warranty, convey, quitclaim, and relinquish to the complainants and their *successors in office, as trustees of schools [*360 and school lands, all the right, title, claim, and interest which they, the said defendants, or any of them, have in and to said section of land; and in default of such conveyance being made by said defendants in the time aforesaid, then the clerk of this court be, and he is hereby, appointed a commissioner to carry into effect that portion of this decree directing said conveyance. It is further ordered, adjudged, and decreed, that the defendants shall pay all the costs of this suit. This ordered, adjudged, and decreed, this 18th of November, 1845."

From which decree the defendants pray an appeal to the Supreme Court of the United States, which is granted.

The cause was argued by *Mr. Lawrence* and *Mr. Badger*, with whom was *Mr. Inge*, for the appellants, no counsel appearing for the appellees.

The counsel for the appellants made the following points:—

1. That by the treaty the whole cession passed to the United States, subject to the reservations mentioned in the treaty, which were in the nature of exceptions out of the grant, and, when actually located according to the treaty, took effect by relation from its date, so as not to be liable to any disposition by the United States; and consequently, if the sixteenth section was rightfully selected as the location of Wall's reservation, the same could not, by any law of the United States, be set apart or appropriated to any other purpose; and if such appropriation in fact was made or attempted, which is not admitted, it was void as against Wall's claim.

2. That, according to the true interpretation of the treaty, each of the persons named in the above-quoted clause of the supplement was entitled to a section, whether he had a residence or not. The fact of a residence was immaterial to the right,—which was absolute, independently of residence,—and only served to determine the location where the party had a residence; those without residences, and the two persons specially excepted out of the restriction imposed by the resi-

dence, having necessarily a right to make locations on any unimproved and unoccupied land. Otherwise, the main purpose of the clause would be disappointed, contrary to its true intent upon sound rules of construction. But if this were doubtful upon the clause itself, our interpretation must still prevail; because by the eighteenth article of the treaty (7 Stat. at L., 336) it is expressly declared and agreed, that even well-founded doubts shall be resolved in its interpretation in *361] favor of the *Indians. And therefore, it not appearing that Wall had any residence of his own, but it being, on the contrary, proved that at the date of the treaty he was an unmarried man, without any family, and residing in the family of another person, the location of his reservation upon the sixteenth section was well and rightfully made, and the patent properly issued.

3. If Wall's reservation was not rightfully located upon the said sixteenth section, yet the appellees were not entitled to relief. Their case is, in substance, that Gaines and Glover, by representing to the President of the United States that Wall had a residence in that section, fraudulently procured the grant to issue, &c. But all such representations are denied by the appellants, and no proof is offered to sustain the charge. The appellants aver, and the fact is, that the location was made and the grant issued upon a representation of the truth as they understood it, and with full knowledge of the facts by the officers of the government. So that, if Wall was not entitled so to locate, the case was one of mere error on the part of the government in the interpretation of the treaty, and not a fraudulent contrivance of the party to prejudice or mislead those officers. And therefore the case, as it appears, would give no ground of relief if truly stated in the bill; and if it would, yet that case does not sustain the bill as framed.

And upon the whole, it will be insisted that the decree is erroneous, and ought to be reversed and the bill dismissed.

The following authorities will be relied on.

On the first point, *Doe v. Beardsley*, 2 McLean, 412; *Stockton v. Williams*, 1 Doug. (Mich.), 547; Act of April 21, 1806 (2 Stat. at L., 401, § 6); Act of March 3, 1803 (2 Stat. at L., 233, § 12); Opinion of Attorney-General (Ex. Doc. 2 Sess. 26th Congress), 1419.

On the second point, *Euchela v. Welsh*, 3 Hawks (N. C.), 155. In connection with the provisions of the treaty, Opinion of Attorney-General, 2 Land Laws, 188, 205.

On the third point, Opinion of Attorney-General, 2 Land Laws, 206.

Mr Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States for the Southern District of the State of Mississippi.

The bill was filed by the appellees in the court below against the defendants, to enjoin proceedings in an action of ejectment brought to recover possession of the sixteenth section of *township twelve, range eighteen east, [*362 County of Kemper, State of Mississippi.

By the twelfth section of an act of Congress, passed March 3, 1803, entitled "An act regulating the grants of land, and providing for the disposal of the lands of the United States south of the State of Tennessee" (2 Stat at L., 229), the sixteenth section in each township was reversed, and appropriated to the support of schools within the same. And by the sixth section of an act of Congress, passed April 21, 1806, entitled an act in addition to the act aforesaid (2 Stat. at L., 401), it was provided, that whenever the sixteenth section should fall upon land already granted by Congress, or claimed by virtue of a British grant, the Secretary of the Treasury should locate another section in lieu thereof for the use of schools within the township. And by an act of Congress, passed January 9, 1815, entitled "An act to provide for leasing certain lands reserved for the support of schools in the Mississippi Territory" (3 Stat. at L., 163), it was provided, that the county court of each county in the Territory should appoint agents, who were empowered to lease these reserved sections for the purpose of improving the same, or for an annual rent, as they might think best; and to apply the proceeds to purposes of education within the township.

The act also provided for laying out the sections into convenient farms, of not less than one hundred and sixty, nor more than three hundred and twenty acres each; for the removal of intruders and trespassers; and also for the punishment of all persons cutting timber or committing other waste upon the tract.

The last section provided, that the leases granted by virtue of the act should be limited to the period of the termination of the Territorial government, and should cease after the 1st of January next succeeding the establishment of the State government.

It is admitted that the appellees are the trustees of schools and school lands in township No. 12, duly elected and qualified under the laws of the State of Mississippi; and that they are charged with the care and management of the same (How. & Hutch. Dig., p. 125 *et seq.*); and also, that John Hilman,

the defendant in the ejectment suit, was in possession under a lease from the said trustees.

They had taken possession of the section as early as 1834. The suit in ejectment was brought in 1841.

The premises lie within the territory formerly belonging to the Choctaw nation of Indians, and which was ceded to the *363] *United States, by treaty, at Dancing Rabbit Creek, 27th September, 1830 (7 Stat. at L., 333).

By the supplementary articles of that treaty (p. 340), certain reservations were made to Indians by name, and among others the following:—"Also, one section is allowed to the following persons, to wit, Middleton Mackey, Wesley Train, Choclehomo, Moses Foster, D. W. Wall, &c., to be located in entire sections, to include their present residence and improvement, with the exception of Molly Nail and Susan Colbert, who are authorized to locate theirs on any unimproved unoccupied land."

D. W. Wall, one of the reservees, on the 27th of August, 1832, assigned all his right and title under the treaty to George S. Gaines and Allen Glover, who procured a patent for the sixteenth section to be issued to them, in pursuance of this claim under the treaty, by the President, on the 7th of December, 1838.

The former, and the heirs of the latter, compose the plaintiffs in the ejectment suit in the court below, claiming under the patent; and the defendants in the bill filed to enjoin that suit by the school trustees, claiming under the acts of Congress above referred to.

The court below granted a preliminary injunction on the filing of the bill, staying the proceedings at law, and on the final hearing decreed a perpetual injunction; and also, that the defendants relinquish all their right and interest in the section to the school trustees and their successors in office.

The clause in the treaty reserving to Wall, among others, a section of the land ceded, upon a strict construction of its terms, would seem to confine the reservation to a tract, not exceeding a section, on which he resided and had made improvements at the date of the treaty; but a more liberal construction has been properly given to the clause by the officers of the government, and which was inculcated by the eighteenth article of the treaty itself, by which the reservee is allowed a section, although not a resident at the time, and without having made any improvements upon the particular tract. In cases of residence and improvements, the location must be such as shall include them.

Wall, it seems, was a minor, and resided with his father at

the date of the treaty, and therefore was not within its terms, so that locality could be given to any particular section by a reference to residence or improvements. But under the liberal construction mentioned, the right to a section, notwithstanding, existed,—a right, however, to no particular tract or *section, but at large, to be located upon some portion of the ceded territory,—what, in common parlance, is denominated a float. [*364]

The deed to Gaines and Glover does not profess to convey any particular section, but only his right, generally, to that amount of land reserved to him under the treaty. A location, therefore, became necessary before the issuing of the patent by the President.

The bill charges that the grantees, Gaines and Glover, in order to induce the President to issue the patent to them for the sixteenth section of township No. 12, which, it is claimed, had been appropriated by the acts of Congress already referred to, for the use of schools, falsely and fraudulently represented that Wall resided upon the same at the date of the treaty, and had made improvements thereon; thus bringing the application for the particular parcel of land within the strict terms of the treaty, and presenting a case upon which the right to it was, confessedly, paramount to any that could be pretended in the State or township, as a school reservation.

This is the ground set forth by the complainants upon which to invoke the equitable interposition of the court to set aside and annul the patent, and remove the encumbrance from their title, and to stay the proceedings at law. And undoubtedly, if the facts thus charged have been established by the pleadings and proofs, a right to such equitable interposition for the relief sought has been made out, and the decree of the court below should be upheld.

But, on looking into the answer and proofs in the record, there does not appear to be any evidence of the fraud or imposition alleged; nor any thing to rebut the presumption, which we must assume till the contrary is shown, that the patent was issued with a full knowledge of all the circumstances upon which the complainants rely to invalidate it. Fraud is not to be presumed, and the burden, therefore, lay upon the complainants to establish it; and having failed, all ground for the equitable relief failed also; and the court below should have dismissed the bill, leaving the parties to the settlement of their rights in the action at law. In the absence of fraud or imposition in the issuing of the patent, the question was one of conflicting title under the treaty on

one side, and the acts of Congress, appropriating every sixteenth section in the townships for the benefit of schools, on the other,—a question purely of law.

The State of Mississippi acquired a right to every sixteenth section, by virtue of these acts, on the extinguishment of the Indian right of occupancy, the title to which, in respect to the *particular sections, became vested, if *365] vested at all, as soon as the surveys were made and the sections designated. No patent was necessary, or is ever issued, for these school sections. And the question presented is, whether the general right reserved to Wall under the treaty, to select a section of land in the ceded territory, operated to suspend the vesting of the title in the State, till a selection could be made and patent issued, under the direction of the President; or whether the selection in respect to these general floating rights, that bound no particular parcel or section, must be made in subordination to the right acquired by the State.

The question, as before said, is one of law, and should have been left to the trial at law in the action of ejectment pending between the parties.

There is no doubt but that all persons in whose behalf reservations were made under the treaty, and who were residents upon any particular tract, and had made improvements thereon at its date, were entitled to the section, including their improvements, in preference to any other right that could have been previously acquired under the government; because the land embraced within the section was so much excepted from the cession. No previous grant of Congress could be paramount, according to the rights of occupancy which this government has always conceded to the Indian tribes within her jurisdiction.

It was so much carved out of the Territory ceded, and remained to the Indian occupant, as he had never parted with it. He holds, strictly speaking, not under the treaty of cession, but under his original title, confirmed by the government in the act of agreeing to the reservation.

But the question here is, whether the reservation of a right, not to any particular parcel or section of the territory ceded, but a right, generally, to have that quantity of land out of it, and to be located under the direction of the President, stands upon the same footing, and has the effect to cut off the right claimed by the State to have attached under the acts of Congress to the school section previous to the location made by the President.

We forbear expressing any opinion upon it, as the question

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is not now properly before us, and as it belongs to the action at law, the trial of which should not be anticipated or the case prejudged.

We shall therefore reverse the decree, and remit the proceedings to the court below, with directions to dissolve the injunction and dismiss the bill of the complainants.

*ORDER.

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This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and was argued by counsel. On consideration whereof, it is now here ordered and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs, and that this cause be, and the same is hereby, remanded to the said Circuit Court, for further proceedings to be had therein, in conformity to the opinion of this court.

ROBERT RUFFIN BARROW, PLAINTIFF IN ERROR, v. JOSIAH REAB.

No exception can be taken in this court which was not moved below, or which does not appear in some way on the record below.
Formerly the laws of Louisiana did not allow interest on accounts or unliquidated claims; but now it is due from the time the debtor is put in default for the payment of the principal.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the District of Louisiana.

Reab was a citizen of Connecticut, and Barrow of Louisiana.

The facts in the case appeared by the record to be these.

On the 5th of February, 1845, Reab purchased, at New Orleans, from J. R. Conner, alleged to be the lawfully authorized agent of Barrow, 35,000 gallons of molasses, at the rate of twelve and a half cents per gallon, to be delivered at Field's Mills on the Bayou Lafourche; said molasses being represented as the crops of two plantations owned by Barrow, one being called the Myrtle Grove Plantation, and the other being called the Home Plantation, or Home Place. At the time of purchase, Reab paid to Conner for Barrow five hundred dollars.

Conner gave an order upon Barrow for the molasses, to be

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delivered to Reab or order, who sent a William Patton for it. The overseer wrote upon the face of the order, in pencil, "The molasses has all been shipped from Myrtle Grove and the Residence."

On the 20th of March, 1845, Reab brought an action in the Circuit Court against Barrow, claiming, for expenses of sending a vessel, &c., and for the rise in the price of molasses, the sum of \$3,755.07.

On the 22d of April, 1845, Barrow answered the petition *367] by *a general denial, and by denying specially that Conner was his agent.

In March, 1847, the cause came up for trial, when the jury found a verdict for the plaintiff for \$3,000, with interest. Whereupon the court entered judgment against Barrow for the sum of three thousand dollars, with interest thereon at the rate of five per cent. per annum from judicial demand, the 29th day of March, 1845, till paid; and the costs of suit.

In the course of the trial, the following bill of exceptions was taken.

"Be it remembered, that on the trial of this cause, to wit, on the 9th day of March, 1847, the plaintiff offered in evidence, attached to the deposition of William C. Patton, a written instrument in the words following:—

" 'Mr. R. R. Barrow, or manager, will deliver to Mr. Josiah Reab, or order, the molasses on Myrtle Grove, as well as the production of the Home Place, or Residence, said molasses to be delivered in casks, to be furnished by the purchaser at Field's mills, and oblige, &c. J. R. CONNER.'"

"Upon which was this indorsement:—

" 'Deliver to Mr. William Patton. JOSIAH REAB.'"

"Written on the face, by overseer of the defendant, in pencil:—

" 'The molasses has all been shipped from Myrtle Grove and the Residence. N. L. F. MONROE.'"

"And after the evidence had been given to the jury by both parties, the defendant, through his counsel, requested the court to charge the jury, that, in order to recover damages for the alleged failure of the defendant to deliver the article sold by his alleged agent, as set forth in the plaintiff's

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petition, it would be necessary for him to show that a demand in writing, or in one of the other modes prescribed by article 1905 of the Louisiana Code, had been made upon him for the delivery of the article sold, by the vendee, or some person authorized, and that he had been put in default according to the terms of the said article 1905. Whereupon the court charged the jury, that, if they should be satisfied that there had been a sale, and that the instrument aforesaid was a memorandum of the sale, with the indorsement of the vendee for the delivery of the thing sold, and that the same had been presented to the defendant or his authorized agent, such would be a demand in writing under the terms of the article 1905 of the Louisiana Code.

*“ To which opinion and charge of the court the defendant, through his counsel, excepted, and prayed [*368 leave of the court that said exception be made of record, and that he have his bill of exception thereto; which leave was granted by the honorable court, and this, the bill of exceptions of the defendant to the said charge of the court, was then and there signed and sealed by the honorable court.

[L. S.]

THEO. H. MCCALED, *U. S. Judge.*”

The defendant, Barrow, sued out a writ of error, and brought the case up to this court.

It was submitted on printed argument by *Mr. Downs*, for the plaintiff in error, and argued orally by *Mr. Baldwin*, for the defendant in error.

Mr. Downs, for the plaintiff in error, contended that the judge erred in his charge to the jury, in this: that in stating what was requisite to make the demand in writing a good one, under the 1905th article of the Louisiana Code, he ought to have informed the jury, among other things, that they must be satisfied that, when the demand was made, a proper tender of the price was also made; for this is a necessary and an essential part of a legal demand, so as to put a party in default or delay, to entitle the plaintiff to recover. This the judge did not do, as the bill of exceptions shows. The Louisiana Code requires this formality, as has been frequently decided by the Supreme Court of Louisiana. La. Code, art. 1905 *et seq.*; 11 La., 77, 101.

II. The court also erred (and this question is submitted as an error apparent on the face of the record) in giving judgment for interest on a demand for damages. Interest can be allowed by the laws of Louisiana only on a liquidated demand, and

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not on a claim for damages. 4 Mart. (La.), 620; 2 La., 580; 4 La., 129-140; 8 La., 572.

Mr. Baldwin, for the defendant in error.

1. The only question which can be raised under the bill of exceptions is, whether the presentment of the written order, with the indorsement of Reab thereon, to the defendant below, or his authorized agent, was a demand in writing. As no particular form of demand is required, it is difficult to conceive how this can be denied. See *Wilbor v. McGillicuddy*, 3 La., 383; *Kelly v. Caldwell*, 4 La., 40.

Conner, who signed the order to deliver, being the agent of the defendant, the order is itself proof that the plaintiff had *369] done every thing necessary to entitle him to receive the merchandise. Consequently, there is no question as to the tender of performance by the plaintiff. If any question of that kind had arisen below, there was abundant proof in the case that the plaintiff had done every thing required of him, and was ready to receive the property; but the exception is taken only to the direction of the judge, that the presentation of this order, with the indorsement of the plaintiff thereon, was a demand in writing.

It was not only a demand in writing, but there was a refusal in writing, which, of course, from its very nature, relieved the plaintiff of the necessity of any further offer or act. If there was no molasses there, it would have been idle to have made any further tender or demand.

The judge did not refuse to charge that a demand must be made and a default proved. His charge is in effect a compliance with the request of the defendant's counsel,—that, admitting the necessity of a demand, it had been proved by the production of the order.

The debtor is put in default by a tender to perform (art. 1907, Louisiana Code) and by a demand of performance (art. 1905). The bill of exceptions alludes only to article 1905, and says nothing about the former. Hence, the instruction only had reference to the demand, and the tender must be implied to have been regularly made.

2. The allowance of interest was proper. The decisions relied on by the counsel for the plaintiff in error were made while an article of the Code of Practice was in force which has since been repealed. That article was as follows (No. 553):—"No interest shall be allowed on accounts or unliquidated demands." It was repealed by the fifteenth section of the act of 20th March, 1839. Louisiana Acts, p. 168.

Since the repeal of that article, the law of interest applica-

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ble to the case is found in art. 1932 of the Civil Code, as follows:—"In contracts which do not stipulate for the payment of interest, it is due from the time the debtor is put in default for the payment of the principal, and is to be calculated on whatever sum shall be found by the judgment to have been due at the time of the default." One of the modes of putting in default is by suit, another by demand, &c. (art. 1905.) Interest might, therefore, have been allowed from the demand, but, as that preceded the suit only a few days, the date of citation was taken.

No question appears to have arisen at the trial in relation to the interest.

*In *Porter v. Barrow*, 3 La. Ann., 140, it was decided, on breach of a similar contract to that which is [*370 the subject of the present suit, that the court may, in its discretion, allow interest from judicial demand. 3 Rob. (La.), 361.

In *Petrie v. Woford*, 3 La. Ann., 562, the court say,— "We have hitherto held that sums due on contracts bear interest from judicial demand, though unliquidated." And see also 2 La. Ann., 878.

In *Ryder v. Thayer*, 3 La. Ann., 149, where the suit was brought for breach of contract to ship goods, the plaintiff was held to be entitled to recover the value of the goods at the port of destination, with interest from the time of judicial demand.

See also *Enders v. Board of Public Works*, 1 Gratt. (Va.), 389, where the court say that, "as a general rule, the value of the articles to be delivered, at the time when they should have been delivered, with interest from such time of delivery, forms the proper measure of damages in actions for the breach of executory contracts for the sale and delivery of personal property." 2 N. Y., 135.

Mr. Justice WOODBURY delivered the opinion of the court.

The plaintiff in error, in his argument, relies on two grounds for reversing the judgment below.

One is, that the judge should have instructed the jury that they must be satisfied, when the demand was made, that a proper tender of the price was also made.

But, on turning to the record, it does not appear that any exception was taken at the trial for any omission of this kind. And it is a well-settled practice, that no exception can be taken here which was not moved below, or which

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does not appear in some way on the record below. *Garland v. Davis*, 4 How., 131, 143.

Besides this objection to the present ground assigned for a reversal, the presumption is, that the judge in truth informed the jury, that a proper tender or readiness to pay must be shown, unless waived by Barrow, or the exception would have been taken there, and would be spread on the record. Much more is this to be presumed, as such tender or readiness was averred in the declaration; and its importance, therefore, was called to mind, as well as being recognized by the laws of Louisiana. *Ferran's Adm'x v. Lambeth et al.*, 11 La., 77, 101.

The other exception urged here is the allowance by the court of interest on the verdict. This allowance appears on the record, and was in conformity to the finding of the jury, which was "for three thousand dollars, with interest."

*371] "To be sure, the laws of Louisiana once provided that "no interest shall be allowed on accounts or unliquidated claims." (Code of Practice, No. 554; 4 Mart. (La.), 620; 2 La., 580; 4 La., 129, 140; and 8 La., 572.) But on the 20th of March, 1839, this provision was repealed. (Louisiana Acts, § 15, p. 168; 2 La. Ann., 878.) And the rule since established, in article 1932 of the Civil Code, is,— "In contracts which do not stipulate for the payment of interest, it is due from the time the debtor is put in default for the payment of the principal, and is to be calculated on whatsoever sum shall be found by the judgment to have been due at the time of the default."

This provision has, in several cases in Louisiana, been held to apply to transactions of this kind, settling the law now to be as the court below virtually adjudged; namely, that "sums due on contracts bear interest from judicial demand, though unliquidated." *Petrie v. Woffard*, 3 La. Ann., 562; *Porter v. Barrow*, Id., 140; and *Ryder v. Thayer*, Id., 149; *Sullivan v. Williams*, 2 La. Ann., 878; 3 Rob. (La.), 361; *Erwin v. Fenwick*, 6 Mart. (La.) n. s., 230.

Such, too, seems to be the rule as to interest in some other States, resting on general principles. *Van Rensselaer v. Jewett*, 2 N. Y., 135; *Enders v. Board of Public Works*, 1 Gratt. (Va.), 389. More especially has this been considered allowable, in England as well as this country, if, as here, interest being given as a part of the damages for a wrongful refusal to fulfil a contract. *Arnott v. Redfern*, 3 Bing., 353; 2 Car. & P., 88; s. c., 1 Maul. & Sel., 169; Doug., 376; *Noe v. Hodges*, 5 Humph. (Tenn.), 103; Pet. C. C., 172; *Cooke* (Tenn.), 445. But the general practice, where no statute or

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usage exists to the contrary, is, not to allow interest on unliquidated damages due in cases of ordinary contracts. *Anonymous*, 1 Johns. (N. Y.), 315; 2 Pa., 652; Pet. C. C., 85, 172, 221; *Colton v. Bragg*, 15 East, 223; 3 Gilm. (Ill.), 626. Independent, however, of the rule elsewhere, the law in Louisiana must, in this instance, govern in respect to interest; and, as we have before shown, it sustains the course adopted by the Circuit Court.

There was one formal exception taken below, and set out on the record, which has not yet been noticed. The defendant insisted, that it was necessary for the plaintiff to show a demand in writing.

"Whereupon the court charged the jury, that if they should be satisfied that there had been a sale, and that the instrument aforesaid was a memorandum of the sale, with the indorsement of the vendee for the delivery of the thing sold, and *that the same had been presented to the defendant or his authorized agent, such would be a demand [*372 in writing under the terms of the article 1905 of the Louisiana Code.

"To which opinion and charge of the court the defendant, through his counsel, excepted."

But in the argument this exception did not appear to be relied on, and could not be successfully, as the sale, by the evidence, seems to have been in writing, the order to receive the article sold in writing, and this order presented, and a refusal indorsed on it, in writing.

On the whole case, then, the judgment below must be affirmed, with damages at the rate of six per cent.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs and damages at the rate of six per centum per annum.

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ROBERT M. HARRISON, UNITED STATES CONSUL, PLAINTIFF, v. GEORGE C. VOSE.

An act of Congress passed on the 28th of February, 1803 (2 Stat. at L., 203), declares that "it shall be the duty of every master or commander of a ship or vessel belonging to citizens of the United States, on his arrival at a foreign port, to deposit his register, sea-letter, and Mediterranean passport with the consul, commercial agent, or vice commercial agent, if any there be, at such port. In case of refusal or neglect of the said master or commander to deposit the papers as aforesaid, he shall forfeit and pay \$500."

The arrival here spoken of means an arrival for purposes of business, requiring an entry and clearance and stay at the port so long as to require some of the acts connected with business; and not merely touching at a port for advices, or to ascertain the state of the market, or being driven in by an adverse wind and sailing again as soon as it changes.¹

Therefore when a vessel arrived at the harbour of Kingston, Jamaica, and came to anchor at about a quarter of a mile from the town, but did not go up to the town, nor come to an entry, nor discharge any part of her cargo, nor take in passengers or cargo at Kingston, nor do any business except to communicate with the consignees, by whom the master was informed that his cargo was sold, deliverable at Savannah la Mar, the master was not liable to the penalty for omitting to deliver his papers to the consul.²

THIS case came up from the Circuit Court of the United States for Maine, upon a certificate of division in opinion between the judges thereof.

*[373] *It was an action of debt for the penalty of five hundred dollars imposed by the statute (2 Stat. at L., 203) which will be presently quoted, brought in the Circuit Court for Maine, in the name of Mr. Harrison, United States Consul at Kingston, in the island of Jamaica, against George C. Vose, master of the brig *Openango*.

By the second section of the act of 28th February, 1803, entitled "An act supplementary to the act concerning consuls and vice-consuls, and for the further protection of American seamen," it is enacted:—"That it shall be the duty of every master or commander of a ship or vessel, belonging to citizens of the United States, who shall sail from any port of the United States after the first day of May next, on his arrival at a foreign port, to deposit his register, sea-letter, and Mediterranean passport with the consul, vice-consul, commercial agent, or vice commercial agent (if any there be at such port); that in case of refusal or neglect of the said master or commander to deposit the said papers as aforesaid, he shall forfeit and pay five hundred dollars, to be recovered by the said consul, vice-consul, commercial agent, or vice commercial agent in his own name, for the benefit of the United States,

¹ CITED. *Marriott v. Brune et al.*, post, *632; *Waring v. The Mayor*, 8 Wall., 120.

² See U. S. Rev. Stat., §§ 2790, 4309, 4310.

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in any court of competent jurisdiction; and it shall be the duty of such consul, vice-consul, commercial agent, or vice commercial agent, on such master or commander producing to him a clearance from the proper officer of the port where his ship or vessel may be, to deliver to the said master or commander all of his said papers. Provided, such master or commander shall have complied with the provisions contained in this act, and those of the act to which this is a supplement."

The action was brought at the October term, 1847. Vose appeared and pleaded *nil debet*, and the cause came on for trial at the same term.

The facts in proof in the case were as follows.

The brig Openango, belonging to citizens of the United States, George C. Vose (the defendant) master, sailed from Eastport, in the State of Maine, in the month of July, 1844, with a cargo of lumber, consigned to Messrs. Darrell & Barclay, merchants, of Kingston, in the island of Jamaica, and arrived at Port Royal, in the harbour of Kingston aforesaid, on the 4th day of September of the same year, and came to anchor at about a quarter of a mile from the town, but did not go up to the town, nor come to an entry, nor discharge any part of her cargo, nor take in cargo or passengers at Kingston, nor do any business, except to communicate with his consignees; by *whom the master of said brig was informed that his cargo was sold, deliverable at Sav- [*874
annah la Mar.

The defendant on his arrival at Kingston, or at any time while said brig lay at anchor at Kingston, did not deposit his register, sea-letter, or Mediterranean passport with the plaintiff, who was the United States Consul at said port of Kingston at the time of the arrival of said brig there, as aforesaid.

After communicating with said consignees, the master of said brig, on the 5th day of said month of September, sailed in said brig from said port of Kingston to a place in said island of Jamaica called Savannah la Mar, where she arrived in due season, came to an entry, discharged her cargo, and where the said master deposited the register, sea-letter, and passport aforesaid with the vice-consul of the United States at said place called Savannah la Mar. One of the defendant's witnesses testified, that said brig arrived at Kingston in the afternoon of the 4th of September, and sailed from Kingston the next morning after her arrival there, as soon as the wind would permit.

It was in proof, from one of the Kingston pilots, that the master of a vessel arriving at Kingston is compelled by law

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to report his arrival at the custom-house, whether his cargo had been previously sold, deliverable at another port, or not, but was under no necessity of coming to an entry.

At the trial, the following question occurred upon the foregoing testimony, to wit:—

Whether it was the duty of the defendant, who was master or commander of the ship or vessel called the *Openango*, on his arrival at Kingston, in the island of Jamaica, to deposit his register, sea-letter, and Mediterranean passport with the United States Consul at said port.

Upon which question, the judges of the said Circuit Court were opposed in opinion; and thereupon, upon the motion of the District Attorney, for and in behalf of the United States, it was ordered by the court, that the said question, upon which the said judges were so opposed, should be certified, under the seal of the court, to the Supreme Court of the United States, at their next session, for a final decision.

LEVI WOODBURY,

Associate Justice of Supreme Court.

ASHUR WARE,

District Judge.

The cause was argued by *Mr. Johnson* (Attorney-General), for the plaintiff, no counsel appearing for the defendant.

Mr. Johnson said, that upon this question the opinions of *375] *two courts below have been conflicting, and the present case has been brought up to have the true construction of the act settled. The cases are *Toler v. White*, 1 Ware, 277, and *Parsons v. Hunter*, 2 Sumn., 419.

As bearing upon the question, the court is referred to the following acts. Collection Act of 10th of August, 1790, § 16 *et seq.* (1 Stat. at L., 158); Act concerning the Registering and Recording of Vessels (*Id.*, 292); Coasting Trade Act, §§ 3, 15, 17, and 22 (*I.*, 306); *United States v. Shackford*, 5 Mason, 445.

There are also hereto annexed copies of two opinions given in the Attorney-General's office in relation to this subject.

“Attorney-General's Office, June 11, 1845.

“HON. JAMES BUCHANAN, *Secretary of State.*

“Sir,—I have had the honor to receive your communication of the 16th April last, with a letter from the United States Consul at Nassau, asking my opinion on the question presented by the consul.

“He states, ‘that his instructions to his agents have been

to this effect, that any voluntary arrival at their ports obliges the master of the vessel, upon his arrival to deposit his register, whether such arrival be for advices or not, or whether the vessel comes to an entry or not, and without respect to her remaining twenty-four hours, or any definite time, or not.' And the question presented for consideration is, Are those instructions warranted by law?

"By the second section of the act of 28th February, 1803, it is made the duty of every master of a vessel, belonging to citizens of the United States, who shall sail from any part of the United States, on his arrival at a foreign port, to deposit his register, sea-letter, or Mediterranean passport with the consul, vice-consul, or commercial agent, if any there be at such port. In case of refusal or neglect, he is subjected to a penalty of five hundred dollars. And the same section makes it the duty of such consul, vice-consul, or commercial agent, 'on such master or commander producing to him a clearance, from the proper officer of the port where his ship or vessel may be, to deliver to the said master or commander all of his said papers.'

"Taking the whole section together, it is very obvious that Congress required the papers of an American vessel in a foreign port to be delivered to the consul only where it was necessary to make an entry at the custom-house. It is on the master's producing a clearance that the consul is to return him his papers, and there can be no clearance where there is no entry. *If an American vessel arrive at her port of discharge, or if, for any reason other than the purpose of trading with the whole or portion of her cargo, she shall remain so long that by the law of the country an entry is required, she must enter at the custom-house of such port, and in all such cases the master must deposit his register. But the law does not extend the duty beyond this. A requisition of a deposit of papers, in all cases of arrival, where by the local laws an entry is not necessary, and where there is no trading or purpose to trade, might add to consular emoluments, but would prove extremely embarrassing to the navigating interest. The object of the law is to compel masters of vessels belonging to American owners, sailing from American ports, to respect our own laws, and those of the foreign countries to whose ports they may go for the purpose of trade; and this object is attained by requiring them to exhibit the evidence of their being lawful traders to our consuls, at the ports where they have to enter. Beyond this, neither the law nor good policy requires that their duty shall extend.

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"I have the honor to be, respectfully, Sir, your 'obedient servant,
"JNO. Y. MASON."

"Attorney-General's Office, September 26, 1849.

"HON. JOHN M. CLAYTON, *Secretary of State.*

"Sir,—The question you have submitted to this office, upon the letter of F. H. Whitmore, Esq., of New Haven, Connecticut, of the 10th September, 1849, 'respecting the demand made by the United States commercial agent at St. Thomas, in all cases of the arrival at that port of an American vessel, whether business is or is not done by her, that the register, &c., be deposited with him,' I have considered.

"The legality of the demand depends upon the proper construction of the second section of the act of Congress of the 28th February, 1803, supplementary to the 'Act concerning consuls and vice-consuls, and for the further protection of American seamen.' 2 Stat. at L., 203.

"By the words of the first part of the section, the master of an American vessel, sailing from a port in the United States, is required to deposit his register, sea-letter, and Mediterranean passport, 'upon his arrival at a foreign port,' with the American consul, &c., &c., if there be one at such port. The duty, regarding this part of the section, only exists upon arrival, without reference to its object, and whether it be voluntary and for business, or otherwise. But the subsequent part qualifies, I think, the general words of *377] the first. It is in the *provision that the consul, &c., on the master's 'producing to him a clearance from the proper officer of the port where his ship or vessel may be,' shall deliver to him 'all of his said papers.' Construing the two clauses together, I think the true meaning of the whole is, that there is to be no deposit of the papers upon an arrival, unless it be an arrival with a view to entry, or where by the local law an entry is required. Where either exists, my opinion is, the deposit with the consul, &c., is to be made; and of course it is the duty of the consul to demand it. It will be seen, I think, that in this view of the case I but concur in the opinion to which you refer, of Mr. Attorney-General Mason, of the 11th of June, 1845.

"After quoting the section of the act in question, he says, 'Taking the whole together, it is obvious that Congress required the papers, &c., to be delivered to the consul only when it was necessary to make an entry at the custom-house'; and therefore, 'if an American vessel arrive at her port of discharge, or if, for any reason other than the purpose of trading with the whole or portion of her cargo, she shall re-

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main so long that, by the law of the country, she must enter at the custom-house of such port,' the deposit must be made.

"Interpreting the section as I do, to require the deposit only when an entry is to be made, he makes it the duty of the master, as I do, to deposit, in case of entry in port, without regard to the manner or object of its being made. The motive for the deposit is, I think, the same in all cases of actual entry, and the trouble and duty of the consul, &c., the same. He is in both cases to take charge of the vessel's papers, and to hold them until she is again cleared, and for the trouble of receiving, preserving, and delivering them (of each of which acts he is to give a certificate under seal), he is entitled to charge two dollars. See chapter 8, section 7, of General Instructions to Consuls, of the 6th June, 1849.

"The result, then, to which I come is this, that the commercial agent at St. Thomas, in the case of all American vessels arriving there, and remaining so long as by the local regulation to be obliged to enter, and afterwards to clear, is entitled, and it is his duty to demand, the surrender of their papers, under the act of 1803, no matter what may be the motive of the entry, whether from business or not.

"I have the honor to be, Sir, your obedient servant,

"REVERDY JOHNSON."

Mr. Justice WOODBURY delivered the opinion of the court.

The question in this case, on which the judges below have *presented a difference in opinion, is one of commercial importance, and of no little difficulty. [*378

The provisions in the act of Congress of February 28, 1803, under which the penalty is claimed by the plaintiff from the defendant, declare, "that it shall be the duty of every master or commander of a ship or vessel belonging to citizens of the United States," "on his arrival at a foreign port, to deposit his register, sea-letter, and Mediterranean passport with the consul, vice-consul, commercial agent, or vice commercial agent, if any there be at such port." 2 Stat. at L., 203, § 2.

The law then adds, "that in case of refusal or neglect of the said master or commander to deposit the said papers as aforesaid, he shall forfeit and pay \$500." There is no clew in this act itself to the meaning of the word *arrival*, or to the object and design of the act, so as to judge whether it has or has not in this instance been violated, except another provision in the close of the same section, that the consul shall, "on such master or commander producing to him a clearance from the proper officer of the port where his ship or vessel

may be, deliver to the said master or commander all of his said papers, provided such master or commander shall have complied with the provisions contained in this act and those of the act to which this is a supplement."

Of course, we must in this, as in all cases, begin the inquiry with the presumption that the defendant is innocent, and that the burden of proof to make out the guilt devolves on the plaintiff. In the construction of a penal statute, it is well settled, also, that all reasonable doubts concerning its meaning ought to operate in favor of the respondent.¹ In the *United States v. Shackford*, 5 Mason, 445, Justice Story says, "It would be highly inconvenient, not to say unjust, to make every doubtful phrase a drag-net for penalties." (p. 450.)

This principle of construction does not make an exception in the act not made by Congress, as is sometimes objected, but it recognizes a limitation allowed or required by the act itself, in order to give to it what it must reasonably be supposed the legislature designed, a natural and obvious intent. Thus, no law of Congress could ever be properly construed as an intention to punish involuntary acts, such as what is done by force of a storm or an enemy.

It is settled, too, that, where penalties are to be recovered, greater fulness of evidence is necessary to make out such a case as the law contemplates. *United States v. Wilson*, 1 Baldw., 101; Greenl. on Ev., § 65. The proof must, then, bring a transaction within the spirit as well as letter of the law, and must usually show a plain breach of both.

*In *The Enterprise*, 1 Paine, 32, it is said, that one *379] shall not incur a penalty in cases of doubt, and courts should not extend a construction beyond what is clear in such cases. See further on this, *Taber's case*, 1 Story, 6; and 1 Story, 255 and 256; and *Sloop Elizabeth*, 1 Paine, 11.

Taking this rule of construction with us, the inquiry is, whether the words "arrival at a foreign port," as used in the first portion of the second section, and on which arrival the master is to deposit his papers, mean any touching at a foreign port for any time, however short, or for any purpose or reason whatever, or only an arrival to transact commercial business, followed in due time by an entry of the vessel.

Sometimes the arrival of a vessel refers, undoubtedly, to her coming into a port from any cause, or for any purpose, and for any period. It is admitted that this may be the literal and general meaning of the term with lexicographers, but in several cases it is used to denote a coming in for cer-

¹ QUOTED. *Gould v. Staples*, 9 Fed. Rep., 162.

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tain special objects of business, and to be followed by remaining there so long as to render an entry of the vessel proper, and a deposit of her papers with a consul prudent and useful.

Thus it is, as to an arrival of a vessel, when she enters a port or harbour in order to close an outward or inward voyage. It is usually a coming to the place of the vessel's destination for her business, and waiting to transact it. It is with a view to stop over twenty-four or forty-eight hours, so as to be obliged by express law or general usage to enter the vessel and cargo, or to sell, or deliver, or purchase a cargo. It is under such circumstances as seem likely to need a consul's advice or assistance, and as give time to come properly under his supervision and jurisdiction.

Which of these ideas was meant by the legislature to be attached to the word "arrival," in this law, is the chief question to be ascertained. If it was the latter meaning, namely, an arrival for business, and to remain long enough to make an entry and clearance proper, then the respondent does not appear to have violated the spirit of the act of Congress, though in other senses of the word his vessel had arrived temporarily at the port of Kingston.

On examination, the words *arrive* and *arrival*, when used in respect to matters of this kind in acts of Congress, will, in several instances, appear to be used in the last sense, as applicable only to an arrival to enter and clear for business. Thus, in the thirteenth section of the act of December 31, 1792, the requirement that a temporary register of a vessel, instead of one lost, shall be delivered up "within ten days after her first *arrival* *within the district to which she belongs," [*380 means, not touching or inquiring only, but arriving to enter and transact business. (1 Ware, 281.)

So in the thirty-first section of the Collection Act, custom-house officers may board a vessel within four leagues of the coast and put seals on boxes, &c., "and if, upon her *arrival* at the port of her entry," they are found broken, &c., a penalty is incurred. (1 Stat. at L., 165.) This manifestly means an arrival to enter for business.

It is well known, that such has always been the practical construction of the act of Congress of 1803, by the mercantile and navigating community, and hence, for a quarter of a century after its passage, no case of a prosecution for violating it appears in the books. Indeed, it has been judicially settled in 5 Mason, 446, before cited, that the word *arrival*, as used in that case, which was very analogous, means an arrival for such a business purpose. There the third section of the act of 1793, ch. 52, provided that a temporary register

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should, "within ten days after the *arrival* of such ship or vessel within the district to which she belongs, be delivered to the collector of said district, and be by him cancelled."

The vessel in that case belonged to Eastport, and was destined to New York, with a cargo from New Brunswick, and after sailing arrived and stopped two hours in the District of Passamaquoddy, including Eastport, for a tide, and put ashore some passengers and took in others, and then departed for New York, her place of final destination; but she did not enter or clear, and was held not to come within the above penal provision.

Beside these analogies, showing the restricted meaning attached to the word *arrival* in several laws connected with navigation, the latter clause of this very act of 1803 contains a provision on this subject, which indicates clearly the design that the arrival must be one so long, and with such a purpose, as to require an entry of the vessel.

In construing all statutes, the whole of them must be scrutinized in order to decide on the meaning of particular parts. 11 Mod., 161; *Stowell v. Zouch*, Plowd., 365; 8 Mod., 8; Bac. Abr., Statute, I. 2; Co. Lit., 381, *a*. This eviscerates the true meaning from the law itself,—*ex visceribus actus*.

In the other portion of this section, after the provision that the papers be delivered to the consul on the arrival of the vessel, he is required to return them only "on such master or commander producing to him a clearance from the proper officer of the port where his ship or vessel may be."

*381] Yet such a *clearance cannot be produced unless the vessel has first entered at the custom-house. Hence the conclusion seems irresistible, that it was not designed to require the master to deliver his papers to the consul, unless arriving with a view to enter his vessel for the transaction of business, and stopping so long as to render such an entry proper for security of the revenue and the supervision of the consul over her business and crew.

The acts of Congress do not make such entry imperative, in most cases, till after twenty-four hours, and in some, not till forty-eight hours (1 Stat. at L., 158, § 16). The rule as to this abroad is probably similar; and as this vessel stopped for a less time, and did no business there, she does not appear to have been required by the local authorities to enter, nor did the master enter her of his own accord. Consequently, no clearance could be presented to the consul to obtain his papers, if they had been delivered, and therefore it does not seem to have been a case contemplated for such a delivery.

Again, a vessel is not considered to *arrive*, so as to be re-

garded as importing her cargo, unless she arrives within a port and with an intent to enter the cargo. *United States v. Lyman*, 1 Mason, 482. It is not enough to come within the limits of the district. *United States v. Vowell*, 5 Cranch, 372.

So the acts of Congress expressly provide, that she need not enter at a port where she arrives, if she desires to go farther to an interior port. Act of 4th August, 1790, § 15 (1 Stat. at L., 158).

Nor does the master appear in this case to have forborne to enter and afterwards obtain a clearance from any fraud or evasion. He did not stop the usual time to require an entry, he needed no entry as he found that he had no business to transact there, he wanted no aid or advice of the consul, nor did his crew, so far as the evidence goes, and he might well, under such circumstances, proceed farther to his finally destined port, without incurring the expenses of an entry and clearance, and the payment of tonnage duties, merely to enable him to deliver his papers to the consul, and immediately receive them back again.

The proviso of the act seems to indicate that the papers are delivered to the consul chiefly as security for two purposes; viz. the payment of extra wages to seamen discharged, and the taking on board destitute seamen when bound home; and hence, if the master does not perform what is thus required, he is not entitled to his papers again, even after an entry and clearance. But as no seamen were discharged here, and as this vessel was not bound homeward, there was no public duty *or policy of this kind to be attained, by showing her papers to the consul. Nor [*382 does it appear that the crew had any grievances to lay before him, which were thus delayed. Indeed, the vessel sailed only a few miles farther, to a neighbouring port, and entered there, where every consular protection and redress were equally open and could equally subserve any public end of this kind in view in enacting the law now under consideration. And while we feel a strong disposition to shield seamen from oppression, and will go for that purpose, in proper cases, to any extent justifiable by law, we must take care that what is intended as a shield to one class shall not be perverted, without justification, into a weapon to vex and burden another class alike meritorious.

It is conceded that a consul is the chief representative and agent of his country in most foreign ports, and as such is to be resorted to by his countrymen. But when a vessel has arrived so as to be required to deposit her papers with him,

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it would seem to be reasonable that she must intend to stay long enough to need or allow the exercise of some of his functions. Those functions are principally to watch over our trade,—actual exports and imports; to exercise jurisdiction in some respects over American vessels and seamen abroad; sometimes of a judicial character (3 Taunt., 162), when they stop and come ashore, or to transmit information home in relation to them.

To be sure, he has a few other duties to perform. But most of them are disconnected with this subject;—as, to take care of American property, either wrecked or belonging to deceased persons; to exercise at times even diplomatic functions; to aid his countrymen in scientific researches; to transmit periodical advices on every thing beneficial to trade or the arts, and, in all emergencies among strangers, to act as the friend and agent of commercial visitors from his own country. Vattel, Law of Nations, *Consuls*; Warden's Consular Establishments; 2 Elliot's Am. Dip. Code, 454; 7 Pet., 276; Bee, Adm., 209; 1 Stat. at L., 254, and note; 10 Wheat., 66; 1 Mason, 14; 1 McCulloch's Dict., *Consul*, 465-467; 2 Beawes's Lex Mercatoria, 42.

The first class of duties may have furnished some reasons for requiring that the papers of vessels be lodged with the consul after an arrival to stay and transact business, and that they remain with the consul till the vessel's clearance. All of that class look to an arrival for purposes of business,—to an entry and clearance, and to a stay there so long as to require some of the acts connected with it, and to need or permit the interference of the agent of their country in *383] some of his appropriate *functions, and especially to enable him to report understandingly that her trade, or her imports or exports, are on American account, and are of a certain value and character.

Again, if a vessel on touching at a port for advices merely, or to ascertain the state of the market, and sailing again forthwith on obtaining them, or on being driven in by an adverse wind and sailing again when it changes, were considered as obliged to send her boat on shore and report to the consul, with her papers, often with unnecessary delay, and always with no object except mere information of her existence at a particular date, the law would be very burdensome without any adequate equivalent. More especially is this the case when this general information can be got and communicated without depositing the papers. If they must be left, they must frequently be lodged, and be forthwith taken

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taken back, and a clearance be obtained, though no entry had been made for business nor wished to be made.

Again, if this must be done whenever a vessel merely touches for a few hours on the outskirts of a port, where the city is ten, thirty, or one hundred miles up a river or bay at which the consul resides,—which is frequently the case,—the provision would be oppressive in the extreme. It might by needless delays defeat the whole benefits of the voyage, and sometimes lead to a loss of the insurance by those delays, or by deviations. It would cause much unnecessary expense in fees and tonnage duties and port charges, which Congress could never have meant to impose, when no business was to be transacted. It would embarrass and clog, rather than aid, commerce, which last is peculiarly the design and policy of legislation by the general government on this vital subject.¹

In some acts of Congress, it is expressly recognized as an excuse from a penalty in respect to a matter like this, if the vessel desires to go farther, to an interior port, or is driven about by stress of weather, by chase of an enemy, or any "other necessity," not saying whether voluntary or involuntary. (1 Stat. at L., 158, 160, 167.)

And it would seem reasonable, not only to construe these penal acts as not designed for such cases, but to regard them as not meant for a touching merely to seek or give information, or to obtain a slight repair, or needed supplies, if it can be done, and the vessel can depart, before law or usage requires an entry.

If any doubt remains, that the arrival spoken of in this act was one to require an entry and clearance in connection with the delivery of the papers to the consul, it should be removed *by the provisions in the act of March 3d, 1817, made [**384 in pari materia* (3 Stat at L., 362)]. Information thus obtained from similar sources is entitled to much weight. 1 Burr., 447; Doug., 276; 15 Johns. (N. Y.), 380. This statute enacts, that foreign vessels, arriving from countries where our consuls are allowed to have charge of the papers of an American vessel in port, must deposit with their consuls here their papers, within forty-eight hours after their entry; and that they be returned, when the master "produces to him (the consul) a clearance in due form from the collector of the port," &c.

Had Congress in this act, or in that under consideration in the present action, meant that the papers should be delivered to the consul when no entry of the vessel was contemplated,

¹ QUOTED. *Gould v. Staples*, 9 Fed Rep., 164.

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why was not the provision made to deliver them before entry instead of afterwards, and to return them when she was ready to sail; and not on producing a clearance?

Our view, then, is, that the term *arrival*, as used in this act, must be construed according to the subject-matter,—to the object of the provision and the expressions in other sections of this act and in other like acts; and that, according to all these, a vessel putting into a foreign port to get information, and getting it without going at all to the upper harbour or wharves, and not entering, or repairing, or breaking bulk, or discharging seamen, or being bound homewards so as to take seamen, or needing the aid of a consul in any respect, but leaving the port in a few hours, not doing any of these, nor being required to, and duly entering and delivering her cargo at a neighbouring port where it had been sold, and there depositing her papers with the vice-consul, cannot be said to have arrived at the first port, so as to come within the spirit of the penal provision, as to depositing her papers with the consul. So far as regards precedents on this matter, the actual decisions of one court and the opinions of two Attorneys-General are in favor of our conclusion; (see the case of *Toler v. White*, in 1 Ware, 275;) while the decision in *Parsons v. Hunter*, 2 Sumn., 419, is not against it, though the reasoning is, and seems to unsettle the question.

See, also, the opinions of the law officers of the government at different periods, June 11th, 1845, and September 26th, 1849, coinciding that the arrival meant here must have been one followed by an entry and clearance. Their opinions, likewise, have without doubt been adopted by the government, and our consuls instructed to conform to them, and this furnishes an additional consideration for not disturbing *385] what is in *operation under them; and especially when a change would be merely to extend a severe penalty to a case doubtful in construction and characterized by good intentions.

The utmost which can be said is, that the master might have intended to enter his vessel at Kingston, if he found that the cargo had been sold there, but ascertaining it was not, he left at once in less than twenty-four hours, by the first fair wind, and before entering or being required to enter. The master, therefore, seems to have acted throughout in good faith, and with no intent to break the law in not depositing his papers at the first port; and it is so doubtful whether he has incurred a penalty, that we think a certificate must be given in his favor. Plowd., 20.

It is gratifying, in respect to this conclusion, that, if it be

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different from the design of Congress in this act, another can at once be passed, requiring expressly in every case, and at whatever delay and expense, that a deposit shall be made of papers with consuls by masters, on touching any part of a port, and for whatever purpose or cause, and for however short a period.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maine, and on the point or question on which the judges of the said Circuit Court were opposed in opinion, and which was certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel. On consideration whereof, it is the opinion of this court, that, on the testimony in this case, it was not the duty of the defendant, who was master or commander of the ship or vessel called the *Openango*, on his arrival at Kingston, in the island of Jamaica, to deposit his register, sea-letter, and Mediterranean passport with the United States Consul at said port. Whereupon, it is now here ordered and adjudged by this court, that it be so certified to the said Circuit Court.

*WILLIAM J. HILL, DAVID M. PORTER, AND WILLIAM F. WALKER, v. THE UNITED STATES ET AL. [*386]

Where the United States, as indorsees of a promissory note, recovered judgment against the makers thereof, who thereupon filed a bill upon the equity side of the court, and obtained an injunction to stay proceedings, this injunction was improvidently allowed. The United States were made directly parties defendants; process was prayed immediately against them, and they were called upon to answer the several allegations in the bill. This course of proceeding falls within the principle that the government is not liable to be sued, except by its own consent, given by law. The bill must therefore be dismissed.¹

THIS case came up from the Circuit Court of the United States for the Southern District of Mississippi, upon a certificate of division in opinion between the judges thereof.

¹ COMMENTED ON. *Bush v. United States*, 8 Sawy., 325, 326. CITED. 207, 227. See *United States v. Eck-Reeside v. Walker*, 11 How., 200; *Jord*, 6 Wall., 488; *Bush v. United States v. Thompson*, 8 Otto, 489; *United States v. Lee*, 16 Otto, 627, 628. *States*, 13 Fed. Rep., 627, 628.

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It was a bill filed on the equity side of the court, by Hill and the other complainants, against the United States, the Mississippi and Alabama Railroad Company, William M. Gwin, and William H. Shelton, to enjoin a judgment obtained against the complainants by the United States.

The circumstances were these.

In 1835, the receiver of public moneys for the Choctaw district in the State of Mississippi was found to be in debt to the government.

On the 26th of September, 1835, the Solicitor of the Treasury issued a distress warrant, under the act of May, 1820, for the purpose of collecting the debt, and inclosed it to William M. Gwin, then Marshal of the United States for the State of Mississippi.

The history of the transaction between 1835 and 1839 need not be stated.

In 1839, the marshal, by direction of the Solicitor and Secretary of the Treasury, received from the representative of the debtor (who was then dead) the sum of \$30,000 in the notes of the Mississippi and Alabama Railroad Company, as collateral security for the debt, for the collection of which he had a distress warrant. The Railroad Company, in order to avoid a suit upon its notes, transferred to the District Attorney upwards of \$78,000 of bills receivable of the bank. Amongst these bills receivable was a promissory note for four thousand dollars, dated on the 12th of April, 1838, payable six months after date to the Mississippi and Alabama Railroad Company, negotiable and payable at their banking-house in Brandon, and signed by William J. Hill, J. S. Rowland, D. M. Porter, and W. F. Walker. The note was joint and several; Hill was the principal, and the others sureties.

*387] *On the 15th of June, 1839, the District Attorney brought suit upon the note, in the name of the United States, against all the parties, and at November term obtained judgment.

In January, 1840, a *fi. fa.* was issued, and in May, 1840, Hill, Porter, and Walker filed a bill on the equity side of the court against the United States, the Mississippi and Alabama Railroad Company, William M. Gwin, and William H. Shelton, setting up certain equities, which need not be here particularly stated, and praying for an injunction, which was granted.

All the parties answered, the District Attorney answering on behalf of the United States.

In May, 1846, the cause was set down for hearing upon the bill, answers, and exhibits.

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In November, 1846, the following proceedings took place.
The United States, by attorney, made the following motion,
to wit :—

“Motion by R. M. Gaines, U. S. Attorney, to dissolve the injunction and dismiss the bill, as to the United States, for want of jurisdiction as to them, and also on the merits.

“R. M. GAINES, *U. S. Att’y*.

“And afterwards, to wit, at the May term, A. D., 1847, of said court, to wit, on the 20th day of May, in the year of our Lord, 1847, this cause came on to be heard before the Honorable Peter V. Daniel and Samuel J. Gholson, upon the motion of the United States of America to dismiss this suit as to them, and dissolve the injunction, for want of jurisdiction, and was argued by counsel. And the court having taken time to consider, and not being able to agree in opinion what decree should be made in the cause on said motion, one of the judges being of the opinion that the said motion should be sustained, and the said bill dismissed and injunction dissolved, and the other being of opinion that the said motion should be overruled, it is therefore ordered, at the request of the counsel for both complainants and defendants, that said difference of opinion be certified to the Supreme Court of the United States for their decision, whether the said motion should be sustained or overruled.

“P. V. DANIEL.
S. J. GHOLSON.”

Upon this certificate the case accordingly came up.

It was argued by *Mr. Johnson* (Attorney-General), for the United States, no counsel appearing upon the other side. He contended that, the United States not being liable to be sued *except with its own consent given by law, and there being no law giving such consent in this case, jurisdiction did not exist, and cited the case of *United States v. Mc-Lemore*, 4 How., 286. [388]

Mr. Justice DANIEL delivered the opinion of the court.

This case comes before us from the Circuit Court for the Southern District of Mississippi, upon a certificate of division in opinion between the judges on the following facts and questions certified from that court.

The United States, as the indorsees of the Mississippi and Alabama Railroad Company, instituted an action of assump-

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sit in the court above mentioned, on a promissory note given by William J. Hill, J. S. Rowland, D. M. Porter, and W. F. Walker to the said railroad company, for the sum of four thousand dollars. At the November term of the court in 1839, the United States, upon a trial at law upon issues joined, first, upon the plea of *non-assumpsit*, and secondly, upon the plea of payment of the note before its indorsement and delivery to the plaintiffs, obtained a verdict and judgment in damages for the sum of \$4,353.32. Upon the suing out of an execution on this judgment, the defendants filed a bill on the equity side of the Circuit Court, and obtained from the District Judge an injunction, upon grounds which perhaps might, under the pleadings in the cause, have been as regularly insisted upon at law, between the proper parties, as they could be in equity; but whether forming a well-founded defence at law, or not, is immaterial in the inquiry now presented. In the bill filed by Hill and others, the United States are made directly parties defendants; process is prayed immediately against them; they are called upon to answer the several allegations in the bill, and a perpetual injunction is prayed for to the judgment obtained by them. To the bill of the complainants attorney for the United States filed in their behalf an answer *in extenso*, but afterwards moved the court to dissolve the injunction and dismiss the bill as to the United States, for want of jurisdiction as to them, upon which motion the order and certificate now before this court were made in the following terms:—"And afterwards, to wit, at the May term of said court, viz., on the 20th day of May, A. D., 1847, this cause came on to be heard before the Hon. Peter V. Daniel and Samuel J. Gholson, upon the motion of the United States of America to dismiss this suit as to them, and dissolve the injunction for want of jurisdiction, and was argued by counsel. And the court having taken time to consider, and not being able to agree in opinion what decree
*389] should be made in the cause on said motion, one of the judges being of opinion that the said motion should be sustained, and the said bill dismissed and injunction dissolved, and the other being of opinion that the said motion should be overruled, it is therefore ordered, at the request of the counsel for both complainants and defendants, that said difference of opinion be certified to the Supreme Court of the United States for their decision, whether the said motion should be sustained or overruled."

The question here propounded, without any necessity for recurrence to particular examples, would seem to meet its solution in the regular and best-settled principles of public

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law. No maxim is thought to be better established, or more universally assented to, than that which ordains that a sovereign, or a government representing the sovereign, cannot *ex delicto* be amenable to its own creatures or agents employed under its own authority for the fulfilment merely of its own legitimate ends. A departure from this maxim can be sustained only upon the ground of permission on the part of the sovereign or the government expressly declared, and an attempt to overrule or to impair it on a foundation independently of such permission must involve an inconsistency and confusion, both in theory and practice, subversive of regulated order or power. Upon the principle here stated it has been, that, in cases of private grievance proceeding from the crown, the petition of right in England has been the nearest approach to an adversary position to the government that has been tolerated; and upon the same principle it is that, in our country, in instances of imperfect land titles, special legislation has been adopted to permit the jurisdiction of the courts upon the rights of the government. Without dilating upon the propriety or necessity of the principle here stated, or seeking to multiply examples of its enforcement, we content ourselves with referring to a single and recent case in this court, which appears to cover the one now before us in all its features. We allude to the case of the *United States v. McLemore*, in 4 How., 286, where it is broadly laid down as the law, that a Circuit Court cannot entertain a bill on the equity side of the court, praying that the United States may be perpetually enjoined from proceeding upon a judgment obtained by them, as the government is not liable to be sued, except by its own consent given by law. We therefore direct it to be certified to the Circuit Court for the Southern District of Mississippi, that the motion on behalf of the United States in this cause should have been sustained, and that the bill as to *the United States should be dismissed, as having been improvidently allowed. [*390]

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and on the point or question on which the judges of the said Circuit Court were opposed in opinion, and which was certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel. On consideration whereof, it is the opinion of this court, that the motion in behalf of the United

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States in this cause should have been sustained, and that the bill as to the United States should be dismissed, as having been improvidently allowed. Whereupon it is now here ordered and decreed by this court, that it be so certified to the said Circuit Court.

WILLIAM H. TAYLOE, APPELLANT, v. THE MERCHANTS' FIRE INSURANCE COMPANY OF BALTIMORE.

Where there was a correspondence relating to the insurance of a house against fire, the insurance company making known the terms upon which they were willing to insure, the contract was complete when the insured placed a letter in the post-office accepting the terms.¹

The house having been burned down whilst the letter of acceptance was in progress by the mail the company was held responsible.

On the acceptance of the terms proposed, transmitted by due course of mail to the company, the minds of both parties have met on the subject, in the mode contemplated at the time of entering upon the negotiation, and the contract becomes complete.²

The practice of this company was to date a policy from the time when the acceptance was made known to their agent.

The agent of the company having instructed the applicant to "send him his check for the premium, and the business was done," the transmission of the check by mail was a sufficient payment of the premium within the terms of the policy.

One of the conditions annexed to the policy was, that preliminary proofs of the loss should be furnished to the company within a reasonable time. The fire occurred on the 22d of December, 1844, and the preliminary proofs were furnished on the 24th of November, 1845. This would have been too late, but that the company must be considered to have waived their being furnished, by refusing to issue a policy, and denying their responsibility altogether.³

The cases in 2 Pet., 25, and 10 Pet., 507, examined.

A court of equity, having obtained jurisdiction to enforce a specific performance of the contract by compelling the company to issue a policy, can proceed to give such final relief as the circumstances of the case demand.⁴

A prayer for general relief in this case covers and includes a prayer for specific performance.⁵

*THIS was an appeal from the Circuit Court of the
*391] United States for the District of Maryland.

A decree *pro forma* was entered, under the agreement of

¹ FOLLOWED. *Northwestern Ins. Co. v. Elliott*, 7 Sawy., 21. CITED. *Matter of Dodge*, 9 Ben., 482; *Lewis v. Brown*, 130 Mass., 175. See *McCully's Adm. v. Phenix Mut. Life Ins. Co.*, 18 W. Va., 784-9.

² CITED. *Uiley v. Donaldson*, 4 Otto, 45; *Eames v. Home Ins. Co.*, Id., 631.

³ CITED. *Baile v. St. Joseph Fire*

&c. Ins. Co., 73 Mo., 387; *Walker Bros. v. Continental Ins. Co.*, 2 Utah T., 335.

⁴ CITED. *Stevens v. Gladding*, 17 How., 455; *First Nat. Bank of New Orleans v. Bohne*, 8 Fed. Rep., 116.

⁵ CITED. *Commercial Mut. Mar. Ins. Co. v. Union Mut. Ins. Co.*, 19 How., 323.

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the parties, dismissing a bill filed by Tayloe against the insurance company under the following circumstances.

The office of the insurance company was at Baltimore, but there was an agent at Fredericksburg, Virginia, who was John Minor.

On the 25th of November, 1844, this agent addressed to the company the following letter.

"Fredericksburg, Virginia, November 25, 1844.

"MERCHANTS' FIRE INSURANCE CO. OF BALTIMORE:—

"The undersigned, William H. Tayloe, desires to effect insurance to the amount of eight thousand dollars on his dwelling-house, of stone covered with wood; main building about ninety by sixty feet, two stories; two wings, two stories, covered with wood, about fifty by fifty feet, and connected with the main building by covered ways of stone, covered with wood. The above-mentioned house is known by the name of Mt. Airy, and is situated in Richmond County, about two miles and a half from the court-house.

**"J. MINOR,
for WILLIAM H. TAYLOE.**

"P. S. Mr. Tayloe (not Mr. Taylor) passed through this place this morning on his way to Alabama, and, not having time to attend to his application, desired me to forward one in his name. The measures given are as nearly correct as I can remember; but, as the building is worth double the amount proposed, the measures are not of much importance. I have long been familiarly acquainted with the house. One thing I should state, that it is built of red sandstone, which in my opinion will not stand fire. Mr. Tayloe's family inhabits the house, and he will return in January or February; meanwhile, I am to communicate to him your answer.

"J. MINOR."

On the 30th of November, 1844, the following answer was received.

"M. F. I. Co., Baltimore, November 30, 1844.

"J. MINOR, ESQ.:—

"Dear Sir,—Yours of 25th and account of 28th are received. I have forwarded Mr. B.'s policy. Mr. Tayloe's risk *will be taken at the same rate as Mr. Bernard's, viz. [*392 70 cts. on \$8,000, p. \$56. Policy, \$1.

"Yours, respectfully,

"GEO. B. COALE, Secretary."

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When this letter was received by Minor, Tayloe was in Alabama, and Minor addressed to him the following letter, which he directed to Demopolis, Alabama, and which was sent from Demopolis to Macon, where Tayloe then was.

"Fredericksburg, December 2, 1844.

"This day I received from the secretary of the board of the Merchants' Fire Insurance Company of Baltimore an answer to your application for insurance to the amount of \$8,000 on the Mount Airy house; rate 70.

| | |
|------------------------------|---------------|
| Premium on \$8,000 | \$56.00 |
| Policy | 1.00 |
| | <hr/> \$57.00 |

"Should you desire to effect the above insurance, send me your check, payable to my order, for \$57, and the business is concluded."

This letter, having been misdirected by Minor, did not reach the appellant until the 20th of December, 1844, and on the next day he wrote Minor the following letter.

"Macon, Marengo County, Ala., 21st Dec., 1844.

"Dear Minor,—Yours of the 2d came to hand yesterday, and I send you my check for fifty-seven dollars, as the premium of insurance on Mount Airy house. You will please deposit the policy in the Bank of Virginia, in your town, &c., &c."

Mem. indorsed, "Mem. rec'd December 31st, 1844."

(Check Inclosed.)

"Marengo County, Ala., 21st Dec., 1844.

"\$57. Bank of Virginia, Fred'g, pay John Minor, Esq., or order, fifty-seven dollars, premium of insurance on Mt. Airy house.
"WM. H. TAYLOE."

Written across the face,—“This check not to be presented.”

On the 22d of December, 1844, the house was burned down.

*393] *On the 1st of January, 1845, Minor addressed a letter to Tayloe, from which the following is an extract.

"Fredericksburg, Jan. 1st, 1845.

"My dear friend,—Your letter of the 21st ultimo came to hand yesterday, unhappily too late. You have before this

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time, perhaps, received information that the centre building of Mount Airy was burnt on Sunday week (Dec. 22d)," &c., &c.

Mr. Minor was informed of the loss by Mr. Charles Tayloe, on the day after it took place.

In the summer of 1845, Tayloe called at the office of the company, and had some conversation respecting the insurance and the burning of his house, and in November, 1845, furnished them with the preliminary proofs of the loss which are always required to be handed in as soon as possible after the loss, by the conditions annexed to the printed policies of the company.

To the letter accompanying the preliminary proof, the company returned the following answer.

*"Merchants' Fire Insurance Co., Baltimore,
Dec. 15th, 1845.*

"W. H. TAYLOE, ESQ.:—

"Dear Sir,—The Merchants' Fire Insurance Company has received your letter of 24th November, 1845, containing notice of claim for loss by fire on 22d December, 1844, and I am instructed to reply that the company declines to pay the claim as thereby made by you, and that, under the circumstances of the case, it does not waive any grounds of defence whatever, but will avail itself of all and any that by law it may.

"Very respectfully, your obedient servant,
(Signed,) GEO. B. COALE, *Sec'y.*"

During the progress of the suit, the following admission was filed in the Circuit Court by the respective counsel.

"Admission.

"It is admitted that the printed advertisement (marked complainant's No. 1) of John Minor, dated on the 27th July, 1842, giving notice of his agency, was published by him in a newspaper published in Fredericksburg, Virginia. It is also admitted, that the letter of said Minor to Wm. H. Tayloe, the complainant, dated December 2d, 1844 (marked complainant's No. 2), was written by said Minor, and addressed to said Tayloe, at Demopolis, Alabama, and afterwards sent from *Demopolis to Macon, Alabama, at the dates [*394 of the two postmarks thereon, where said Tayloe then was; and that the letter from said Minor to said Tayloe, dated 1st January, 1844 (1845), (marked complainant's No. 3,) was written by said Minor. It is agreed that the charter of the said defendants (Act of Maryland, 1835, ch. 65, and

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supplements) may be used by either party, and read from the printed laws, as if proved; and also it is admitted that the printed blank policy, filed with the defendants' answer as an exhibit, is the form uniformly used by said defendants from its incorporation till this time, and that the exhibits G, H, and I, with the defendants' answer, are admitted; and all of said above papers may be used, at the trial of the above cause, as if the same had been regularly proved by the respective parties.

"JOHN GLENN, *for Complainant.*

JOHN J. LLOYD, *for Defendants.*"

In April, 1846, Tayloe filed his bill in the Circuit Court. It stated the substance of the facts above mentioned, and concluded thus:—

"To the end, therefore, that he may have redress on the premises, and that by a decree of this court the said defendants may be ordered and adjudged to pay to your orator the amount of actual loss which he has sustained, to an amount not exceeding eight thousand dollars, and that he may have such further relief as his case may require: may it please your honors to order that a writ of subpoena may issue, directed to said Merchants' Fire Insurance Company of Baltimore, to be and appear in this court to answer this bill, and to stand to and abide by the decree in the premises; and he will ever pray, &c.

"R. JOHNSON,
J. GLENN."

The answer of the appellees admits, that John Minor was the agent of the appellees, at Fredericksburg, Virginia, "to receive and forward to appellees proposals for insurance against fire"; that said agent did, on 25th of November, 1844, in behalf of the appellant, send a proposal for insurance, which was answered on the 30th of November, 1844; but that no reply was received from appellant till the 31st of December, 1844, by a letter inclosing appellant's check for the amount of the premium. That immediately on the receipt of said reply, the appellant was informed that it came too late; that the dwelling proposed to be insured had been burnt on the 22d of December, 1844, and that the check had
*395] not been and would not be *presented for payment, and that said check was cancelled. The answer further exhibits a copy of the printed form of the policy uniformly used by the appellees in 1844, and before and since that time, and avers that it contains the terms and con-

ditions on which the appellees insured, and that all answers of the appellees to applications for insurance against fire have always been with reference to the terms of said policy, and the printed conditions thereto annexed; and it further avers, that the reply of the appellees to the application on behalf of the appellant, in this instance, was made with reference to said terms and printed conditions, and that except on those terms and conditions the appellees would not and did not offer to insure the appellant. The answer further denies that any contract of insurance was at any time made by appellees with the appellant, or that any premium of insurance was paid by appellant or received by appellees, or that the appellant had a right to demand a policy of insurance, or payment for loss by fire. It also denies that the appellant, before filing his bill, required appellees to furnish him with a policy of insurance, or that any demand of payment for the loss by fire was made, except as therein specified, in the summer of 1845, and after that time, as particularly set forth in the answer. The answer further insists, that, if it should be held that the transactions relating to said application did amount to a contract of insurance, yet it was a contract on the terms and conditions specified in the policy, and that the appellant never complied therewith, and particularly never complied with the seventh printed condition which is set forth in the answer, and therefore he is not entitled to demand payment.

The blank policy (which, it is admitted,—see *Admission, supra*,—"is the form uniformly used by the appellees from their incorporation till this time") provides, "that the amount of such loss or damage as the assured shall be entitled to receive by virtue of this policy shall be paid within sixty days after notice and proof thereof made by the assured in conformity to the conditions of this corporation subjoined to this policy."

It also provides, that the "insurance is made and accepted in reference to the conditions which accompany these presents; and in every case the said conditions are to be used to explain the rights and obligations of the parties, except so far forth as the policy itself specially declares those rights and obligations."

The fifth condition is,—“No insurance will be considered as made, or binding, until the premium be actually paid.”

The seventh condition provides, that "all persons insured by this company, sustaining any loss or damage by fire, are *forthwith to give notice to the company, and as soon [*396 thereafter as possible to deliver in as particular an

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account of their loss or damage, signed by their own hands, as the nature of the case will admit, and make proof of the same by their oath or affirmation," &c., &c. "And, until such affidavits and certificates are produced, the loss shall not be payable."

The appellant examined several witnesses under a commission issued to Fredericksburg, Va. John Minor, the agent, proves that the appellant authorized and requested him to apply to the appellees to effect the insurance, and that in consequence thereof the application was written by him. That on the 31st of December, 1844, he received a letter from appellant inclosing his check for \$57, which the appellant directed to be applied to the payment of the insurance on the property, but that the check was never presented for payment, because the property on which the insurance was to have been effected was destroyed on the 22d of December, 1844. That soon after the receipt of said letter and check, the deponent wrote to appellant that his check had been received, but too late. And on his cross-examination he proves that he held said check subject to appellant's order, and wrote across its face, "This check is not to be presented," of all which he duly advised the appellant by letter written, as he thinks, immediately after receipt of the check, and that when the appellant returned to Virginia, deponent told him he was ready to return the check, and tendered it to him, &c.; that he kept it, by appellant's direction, but always subject to appellant's authority. He also proves, in answer to the sixth cross-interrogatory, that, if there had been no fire before the receipt of the check, and a policy had been issued, the insurance, according to the custom and practice of his agency, would have begun, in ordinary cases, on the day on which payment of the check was made; but that in this particular case, as deponent was willing to cash the appellant's check, it would have begun on the day the check came to hand.

In November, 1847, the cause came on for trial, when the Circuit Court passed a decree, (which it has already been stated was *pro forma* under the agreement of the parties,) that the bill should be dismissed, with costs.

The complainant, Taylor, appealed to this court.

It was argued by *Mr. Johnson* (Attorney-General), for the appellant, and by *Mr. Lloyd* and *Mr. Nelson*, for the appellees.

For the appellant it was contended,—

1st. That on the 21st of December, 1844, a contract for

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the *insurance of the appellant's house of Mount Airy [*397 was entered into between him and the appellees, through their agent, and the premium paid by the appellant as agreed on, and that he was entitled to a policy of insurance accordingly, taking effect from that day. Story on Contr., §§ 378, 384, and the cases cited in the notes; 1 Duer on Ins., 67, 68, and the cases cited in notes 8 and 9, pages 114 to 130; *Hamilton v. Lycoming Insurance Co.*, 5 Pa. St., 339; Story on Agency, §§ 17, 18, 19, 126, 127; *Lightbody v. The North American Ins. Co.*, 23 Wend. (N. Y.), 22; *Armistead v. The Merchants' Fire Ins. Co. of Baltimore*, Circuit Court, U. S., Md., unreported.

3d. That the loss to the extent of the whole amount insured occurred after the policy took effect, and that the loss is recoverable in the present suit. 1 Duer on Ins., 66; *Perkins v. The Washington Ins. Co.*, 4 Cow. (N. Y.), 646; *Carpenter v. The Mutual Safety Ins. Co.*, 4 Sandf. (N. Y.), 410.

3d. That the delay in furnishing the preliminary proofs was occasioned by the appellees, who cannot in consequence take advantage of it, and that the appellees have virtually waived their production. *Columbia Ins. Co. v. Lawrence*, 10 Pet., 514; *Cornell v. Leroy*, 9 Wend. (N. Y.), 165; *Turley v. The North American Fire Ins. Co.*, 25 Id., 378; *McMasters v. The Westchester Mutual Ins. Co.*, Id., 382; *Allegre v. The Maryland Ins. Co.*, 6 Harr. & J. (Md.), 412; *Armistead v. The Merchants' Fire Ins. Co. of Baltimore*, *supra*.

The counsel for the appellees contended,—

1st. That the appellant has not shown by the evidence any contract of insurance on the part of the appellees in respect of the property destroyed.

2d. That, assuming such contract to have been shown, the appellant has not complied with its terms and stipulations so as to entitle him to recover from the appellees. *The Columbia Ins. Co. v. Lawrence*, 2 Pet., 25; *Columbia Ins. Co. v. Lawrence*, 10 Pet., 507; *Carpenter v. The Prov. Wash. Ins. Co.*, 16 Pet., 496; *Carpenter v. The Prov. Wash. Ins. Co.*, 4 How., 185; *Leadbetter v. Insurance Co.*, 13 Me., 265; *Worsley v. Wood and others*, 6 T. R., 710; *Oldman v. Bewicke*, 2 H. Bl., 577, *n. a*; *Inman v. The Western Fire Ins. Co.*, 12 Wend. (N. Y.), 452; *Edwards v. The Baltimore Fire Ins. Co.*, 3 Gill (Md.), 177.

3d. That even if the appellant has shown the existence of the alleged contract, and his compliance with its terms, he has misconceived his remedy, a court of law being competent to

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*398] *afford him adequate redress. Act of Congress approved 24th Sept., 1789, § 16.

4th. That, if relievable in equity, the bill contains no sufficient statement of the contract sought to be enforced, or of the performance of the terms thereof by the appellant. 2 Story, Eq., §§ 736, 771; *Colson v. Thompson*, 2 Wheat., 336; *Cross v. Cohen*, 3 Gill (Md.), 257; *Carpenter v. Prov. Wash. Ins. Co.*, 16 Pet., 496; *Same v. Same*, 4 How., 185.

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court for the District of Maryland, which was rendered for the defendants.

The case in the court below was this. William H. Tayloe, of Richmond County, Virginia, applied to John Minor, the agent of the defendants, residing at Fredericksburg in that State, for an insurance upon his dwelling-house to the amount of \$8,000 for one year, and, as he was about leaving home for the State of Alabama, desired the agent to make the application in his behalf.

The application was made accordingly, under the date of 25th November, 1844, and an answer received from the secretary of the company, stating that the risk would be taken at seventy cents on the thousand dollars, the premium amounting to the sum of fifty-six dollars. The agent stated in the application to the company the reason why it had not been signed by Tayloe; that he had gone to the State of Alabama on business, and would not return till February following; and that he was desired to communicate to him at that place the answer of the company.

On receiving the answer, the agent mailed a letter directed to Tayloe, under date of the 2d of December, advising him of the terms of the insurance, and adding, "Should you desire to effect the insurance, send me your check payable to my order for \$57, and the business is concluded." The additional dollar was added for the policy.

This letter, in consequence of a misdirection, did not reach Tayloe till the 20th of the month; who, on the next day, mailed a letter in answer to the agent, expressing his assent to the terms, and inclosing his check for the premium as requested. He also desired that the policy should be deposited in the bank for safe-keeping. This letter of acceptance was received on the 31st at Fredericksburg by the agent, who mailed a letter in answer the next day, communicating to Tayloe his refusal to carry into effect the insurance, on the ground that his acceptance came too late, the centre building

of the *dwelling-house in the mean time, on the 22d of [*399 the month, having been consumed by fire.

The company, on being advised of the facts, confirmed the view taken of the case by their agent; and refused to issue the policy, or pay the loss.

A bill was filed in the court below by the insured against the company, setting forth, substantially, the above facts, and praying that the defendants might be decreed to pay the loss, or for such other relief as the complainant might be entitled to.

I. Several objections have been taken to the right of the complainant to recover, which it will be necessary to notice; but the principal one is, that the contract of insurance was not complete at the time the loss happened, and therefore, that the risk proposed to be assumed had never attached.

Two positions have been taken by the counsel for the company for the purpose of establishing this ground of defence.

1. The want of notice to the agent of the company of the acceptance of the terms of the insurance; and,

2. The non-payment of the premium.

The first position assumes that, where the company have made an offer through the mail to insure upon certain terms, the agreement is not consummated by the mere acceptance of the offer by the party to whom it is addressed; that the contract is still open and incomplete until the notice of acceptance is received; and that the company are at liberty to withdraw the offer at any time before the arrival of the notice; and this even without communicating notice of the withdrawal to the applicant;—in other words, that the assent of the company, express or implied, after the acceptance of the terms proposed by the insured, is essential to a consummation of the contract.

The effect of this construction is, to leave the property of the insured uncovered until his acceptance of the offer has reached the company, and has received their assent; for, if the contract is incomplete until notice of the acceptance, till then the company may retract the offer, as neither party is bound until the negotiation has resulted in a complete bargain between the parties.

In our apprehension, this view of the transaction is not in accordance with the usages and practice of these companies in taking risks; nor with the understanding of merchants and other business men dealing with them; nor with the principles of law, settled in analogous cases, governing contracts entered into by correspondence between parties residing at a distance.

*400] *On the contrary, we are of opinion that an offer under the circumstances stated, prescribing the terms of insurance, is intended, and is to be deemed, a valid undertaking on the part of the company, that they will be bound, according to the terms tendered, if an answer is transmitted in due course of mail, accepting them; and that it cannot be withdrawn, unless the withdrawal reaches the party to whom it is addressed before his letter of reply announcing the acceptance has been transmitted.

This view of the effect of the correspondence seems to us to be but carrying out the intent of the parties, as plainly manifested by their acts and declarations.

On the acceptance of the terms proposed, transmitted by due course of mail to the company, the minds of both parties have met on the subject, in the mode contemplated at the time of entering upon the negotiation, and the contract becomes complete. The party to whom the proposal is addressed has a right to regard it as intended as a continuing offer until it shall have reached him, and shall be in due time accepted or rejected.

Such is the plain import of the offer. And besides, upon any other view, the proposal amounts to nothing, as the acceptance would be but the adoption of the terms tendered, to be, in turn, proposed by the applicant to the company for their approval or rejection. For, if the contract is still open until the company is advised of an acceptance, it follows, of course, that the acceptance may be repudiated at any time before the notice is received. Nothing is effectually accomplished by an act of acceptance.

It is apparent, therefore, that such an interpretation of the acts of the parties would defeat the object which both had in view in entering upon the correspondence.

The fallacy of the argument, in our judgment, consists in the assumption, that the contract cannot be consummated without a knowledge on the part of the company that the offer has been accepted. This is the point of the objection. But a little reflection will show, that in all cases of contracts entered into between parties at a distance by correspondence, it is impossible that both should have a knowledge of it the moment it becomes complete. This can only exist where both parties are present.

The position may be illustrated by the case before us. If the contract became complete, as we think it did, on the acceptance of the offer by the applicant, on the 21st December, 1844, the company, of course, could have no knowledge

of it until *the letter of acceptance reached the agent, on the 31st of the month; and, on the other hand, [*401 upon the hypothesis it was not complete until notice of the acceptance, and then became so, the applicant could have no knowledge of it at the time it took effect. In either aspect, and, indeed, in any aspect in which the case can be presented, one of the parties must be unadvised of the time when the contract takes effect, as its consummation must depend upon the act of one of them in the absence of the other.

The negotiation being carried on through the mail, the offer and acceptance cannot occur at the same moment of time; nor, for the same reason, can the meeting of the minds of the parties on the subject be known by each at the moment of concurrence; the acceptance must succeed the offer after the lapse of some interval of time; and, if the process is to be carried farther in order to complete the bargain, and notice of the acceptance must be received, the only effect is to reverse the position of the parties, changing the knowledge of the completion from the one party to the other.

It is obviously impossible, therefore, under the circumstances stated, ever to perfect a contract by correspondence, if a knowledge of both parties at the moment they become bound is an essential element in making out the obligation. And as it must take effect, if effect is given at all to an endeavour to enter into a contract by correspondence, in the absence of the knowledge of one of the parties at the time of its consummation, it seems to us more consistent with the acts and declarations of the parties, to consider it complete on the transmission of the acceptance of the offer in the way they themselves contemplated; instead of postponing its completion till notice of such acceptance has been received and assented to by the company.

For why make the offer, unless intended that an assent to its terms should bind them? And why require any further assent on their part, after an unconditional acceptance by the party to whom it is addressed?

We have said that this view is in accordance with the usages and practice of these companies, as well as with the general principles of law governing contracts entered into by absent parties.

In the instructions of this company to their agent at Fredericksburg, he is advised to transmit all applications for insurance to the office for consideration; and that, upon the receipt of an answer, if the applicant accepts the terms, the contract is considered complete without waiting to communicate the

*402] *acceptance to the company; and the policy to be thereafter issued is to bear date from the time of the acceptance.

The company desire no further communication on the subject, after they have settled upon the terms of the risk, and sent them for the inspection of the applicant, in order to the consummation of the bargain. The communication of the acceptance by the agent afterwards is to enable them to make out the policy. The contract is regarded as complete on the acceptance of the terms.

This appears, also, to have been the understanding of the agent; for, on communicating to the insured the terms received from the company, he observes, "Should you desire to effect the above insurance, send me your check payable to my order for fifty-seven dollars, and the business is concluded"; obviously enough importing, that no other step would be necessary to give effect to the insurance of the property upon the terms stated.

The cases of *Adams v. Linsdell*, 1 Barn. & Ald., 681, and *Mactier's Adm'rs v. Frith*, 6 Wend. (N. Y.), 104, are authorities to show that the above view is in conformity with the general principles of law governing the formation of all contracts entered into between parties residing at a distance by means of correspondence.

The unqualified acceptance by the one of the terms proposed by the other, transmitted by due course of mail, is regarded as closing the bargain, from the time of the transmission of the acceptance.

This is, also, the effect of the case of *Eliason v. Henshaw*, 4 Wheat., 228, in this court, though the point was not necessarily involved in the decision of the case. The acceptance there had not been according to the terms of the bargain proposed, for which reason the plaintiff failed.

2. The next position against the claim is the non-payment of the premium.

One of the conditions annexed to the policies of the company is, that no insurance will be considered as made or binding until the premium be actually paid; and one of the instructions to the agent was, that no credit should be given for premiums under any circumstances.

But the answer to this objection is, that the premium, in judgment of law, was actually paid at the time the contract became complete. The mode of payment had not been prescribed by the company, whether in specie, bills of a particular bank, or otherwise; the agent, therefore, was at liberty to exercise a discretion in the matter, and prescribe the mode of

*payment; and, accordingly, we find him directing, in this case, that it may be paid by a check payable to his order for the amount. It is admitted that the insured had funds in the bank upon which it was drawn, at all times from the date of the check till it was received by the agent, sufficient to meet it; and that it would have been paid on presentment. [*403]

It is not doubted, that, if the check for the premium had been received by the agent from the hands of the insured, it would have been sufficient; and in the view we have taken of the case, the transmission of it by mail, according to the directions given, amounts, in judgment of law, to the same thing. Doubtless, if the check had been lost or destroyed in the transmission, the insured would have been bound to make it good; but the agent, in this respect, trusted to his responsibility, having full confidence in his ability and good faith in the transaction.

II. Another objection taken to the recovery is, that the usual preliminary proofs were not furnished, according to the requirement of the seventh article of the conditions annexed to the policies of the company. These are required to be furnished within a reasonable time after the happening of the loss. The fire occurred on the 22d of December, 1844, and the preliminary proofs were not furnished till the 24th of November, 1845. This was, doubtless, too late, and the objection would have been fatal to the right of the complainant, if the production of these proofs were essential to the recovery.

But the answer is, that the ground upon which the company originally placed their resistance to the payment of the loss, and which is still mainly relied on as fatal to the proceedings, operated as a waiver of the necessity for the production of the preliminary proofs; and that is, that no obligation to insure the loss was ever entered into by the company, the contract being incomplete at the time it occurred. On this ground they refused to issue the policy, which would have imposed upon the insured a strict compliance with its conditions; or to recognize any obligations arising out of the arrangement between him and their agent.

The objection went to the foundation of the claim, which, in connection with the refusal to issue the policy, superseded the necessity of producing these proofs; as the production would have been but an idle ceremony on the part of the insured, in the further prosecution of his right. Why produce them after the company had denied the contract, and refused the policy?

The case of the *Columbian Insurance Company v. Lawrence*,
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*404] *2 Pet., 25, has been referred to on this point. An objection was there taken, on the trial, to the sufficiency of the preliminary proofs, on the ground that the certificate of the magistrate was not in conformity with the ninth article of the conditions. The particular objection had not been taken by the company when the proofs were furnished, although several others had been, to their liability; and the court left to the jury the question, among others, whether the company had not thereby waived the objection to the sufficiency of the certificate.

The plaintiff recovered; and on the motion for a new trial, among other grounds assigned for granting it, was this instruction of the court. It was held that there was no evidence in the case from which the jury could properly infer a waiver.

The preliminary proofs had been presented to the company on the 16th of February, 1824, soon after the loss. The suit was discontinued, and a new certificate procured from the magistrate correcting the defects in the first, and furnished to the company, on the 14th of February, 1829, five years after the first had been delivered. A new suit was brought, and the case as reported the second time will be found in 10 Pet., 507.

On the second trial, the objection was taken that the certificate had not been produced within a reasonable time after the loss; but the court held otherwise, placing their decision upon the ground, that the laches were not properly imputable to the insured, but to the company, on account of their neglect to give notice of the defect when the first certificate was presented, and of the mistaken confidence which the party had placed in them. The court say, "If the company had contemplated the objection, it would have been but ordinary fair-dealing to have apprised the plaintiff of it; for it was then obvious that the defect might have been immediately supplied; as it was, the company, unintentionally it may be, by their silence misled him."

It is manifest, on an examination of the two cases, that the doctrine of the first on this point of waiver was virtually overruled, for, if maintained in the second, it would have upheld the ruling at the Circuit in the first. The reasons given in support of the corrected certificate, procured and furnished some five years after the loss, are cogent and unanswerable in favor of the position, that the conduct of the company in not objecting to the defect in the first one, at the time it was furnished, operated to mislead the party, and should have been regarded as a waiver of the objection.

The cases are very full upon this point, and clearly establish the position that the preliminary proofs, under the *circumstances stated in this case, were dispensed with by the company, as inferrible from the ground [*405 upon which they placed their denial of liability. 9 Wend. (N. Y.), 165; 25 Id., 378, 382; 6 Harr. & J. (Md.), 412; 6 Cow. (N. Y.), 404.

III. It has also been objected, that the plaintiff had an adequate remedy at law, and was not, therefore, under the necessity of resorting to a court of equity; which may very well be admitted.

But it by no means follows from this, that a court of chancery will not entertain jurisdiction. Had the suit been instituted before the loss occurred, the appropriate, if not the only, remedy would have been in that court, to enforce a specific performance, and compel the company to issue the policy. And this remedy is as appropriate after as before the loss, if not as essential, in order to facilitate the proceedings at law. No doubt, a count could have been framed upon the agreement to insure, so as to have maintained the action at law. But the proceedings would have been more complicated and embarrassing than upon the policy. The party, therefore, had a right to resort to a court of equity to compel the delivery of the policy, either before or after the happening of the loss; and being properly in that court after the loss happened, it is according to the established course of proceeding, in order to avoid delay and expense to the parties, to proceed and give such final relief as the circumstances of the case demand.

Such relief was given in the case of *Motteux v. London Assurance Co.*, 1 Atk., 545, and in *Perkins v. Washington Ins. Co.*, 4 Cow. (N. Y.), 646. See also 1 Duer (N. Y.), 66 and 110, and 2 Phill., 583.

As the only real question in the case is the one which a court of equity must necessarily have to decide, in the exercise of its peculiar jurisdiction in enforcing a specific execution of the agreement, it would be an idle technicality for that court to turn the party over to his remedy at law upon the policy. And, no doubt, it was a strong sense of this injustice that led the court at an early day to establish the rule, that, having properly acquired jurisdiction over the subject for a necessary purpose, it was the duty of the court to proceed and do final and complete justice between the parties, where it could as well be done in that court as in proceedings at law.

IV. It is further objected, that, admitting the claim to be

properly enforceable in equity, still the complainant is not entitled to the relief sought, on the ground that the bill contains no sufficient statement of the contract, or of the performance of the conditions, and also for want of a proper prayer.

*406] *We are of opinion that these several objections are not well founded. The contract as set forth we have already considered, and held complete and binding on the the company; and further, that the denial of having entered into the agreement, and refusal to issue the policy, also set forth, are sufficient ground upon which to infer a waiver of the production of the preliminary proofs, as a condition of liability; and if sufficient ground to infer a waiver, it was of course unnecessary to set forth these proofs in the bill. And as to the prayer, it is sufficient to say, that the prayer for general relief which is here found will enable the court to make such a decree as the complainant may show himself entitled to, upon the facts set forth in the stating part of the bill.

The pleading is not very formal, nor very cautiously drawn, and, in the absence of the prayer for general relief, might have led to embarrassment in making the proper decree in the case. There is a specific prayer for a decree for the loss, but it would have been more formal and appropriate, regarding the ground of jurisdiction in these cases, to have added also a prayer for a specific performance of the agreement to insure.

But the particular relief permitted under a general prayer, where the statement in the body of the bill is sufficient to entitle the party to it, meets the difficulty suggested, and well warrants the decree proposed to be entered. (Story, Eq. Pl., §§ 41, 42, and cases.)

Upon the whole, without pursuing the examination further, we are of opinion that the decree of the court below should be reversed, and that the cause be remitted, with directions to the court to take such further proceedings therein as may be necessary to carry into effect the opinion of this court.

Mr. Justice CATRON stated from the bench, that he objected to a decree being made by this court on the bill, because the cause came here by a transfer from the Circuit Court, never having been heard there. It was only prepared for hearing, and is now presented and heard as an original cause in this court. We have appellate and not original jurisdiction in such cases, both by the Constitution and by the

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Judiciary Act of 1789. Before an appeal can be prosecuted, something must be adjudged to appeal from. And in the second place, if it be once established that causes can be sent here by mere transfer, nothing having been decided below, we must be overwhelmed by such causes, there being now thirty courts and more that may send them up. This is one evil intended to be avoided by the framers of the Constitution, when the Supreme Court was excluded from the exercise of original jurisdiction in cases like the present.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maryland, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs, and that this cause be, and the same is hereby, remanded to the said Circuit Court, with directions to that court to take such proceedings therein as may be necessary to carry into effect the opinion of this court.

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Where the cause of action accrued in the State of Mississippi, and suit was brought upon it in the State of Alabama, a plea of the statute of limitations of Mississippi was not a good plea; but the same was demurrable, and the court sustained the demurrer.

The rule is, that the statute of limitations of the country in which the suit is brought may be pleaded to bar a recovery upon a contract made out of its political jurisdiction, and that the statute of *lex loci contractus* cannot.¹

The obligations of a contract upon the parties to it, except in well-known cases, are to be expounded by the *lex loci contractus*; but suits brought to enforce contracts, either in the State where they were made or in the courts of other States, are subject to the remedies of the forum in which the suit is, including that of statutes of limitation.²

¹ CITED. *Hanger v. Abbott*, 6 Wall., 538.

² DISTINGUISHED. *Moore v. State*, 14 Vr. (N.J.), 205. FOLLOWED. *Goodwin v. Morris*, 9 Oreg., 324. See *Bacon v. Howard*, 20 How., 22, and note to *Brabston v. Gibson*, ante, *263.

A State may by statute bar remedies on contracts made in other States

and prescribe for suits thereon a more limited period than on contracts arising within the State. *Hawse v. Burgmire*, 4 Col., 313.

The statute of limitations of the *locus contractus* cannot be pleaded in bar in a foreign jurisdiction, where both parties were resident in the *locus contractus* during the whole statutory

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The cases of *Leroy v. Crowinshield*, 2 Mason, 151, and *McElmoyle v. Cohen*, 13 Pet., 312, examined and commented on.

THIS case was brought up, by writ of error, from the District Court of the United States for the Middle District of Alabama.

Townsend was a citizen of the State of Mississippi, and Jemison of Alabama.

In September, 1844, Jemison brought a suit, in the District Court of the United States for the Middle District of Alabama, against Townsend, who was in Alabama.

The nature of the suit is explained in the following short specification of claim, filed by the counsel for the plaintiff.

"This action is brought to recover damages for the non-performance of an agreement made by the defendant with the plaintiff, that if the plaintiff would procure, take up, and obtain a note made by Robert Weir, A. F. Young, and the said defendant, and Henry Buchanan, for \$4,000, dated Columbus, April 12, 1839, payable nine months after the 24th of April, 1839, to the Mississippi Union Bank, at their banking-house in Jackson, bearing ten per cent. interest after maturity, if not punctually paid, but upon which note the said A. F. Young was to pay the said bank \$1,000; and would also procure, take up, and obtain a note, made by the said defendant and A. F. Young, Andrew Weir, and Henry Buchanan, dated Columbus, April 12, 1839, for \$4,000, payable nine months after the 24th of April, 1839, to the Mississippi Union Bank, at its banking-house in Jackson, to bear ten per cent. interest after maturity, if not punctually paid, but upon which note A. F. Young was to pay \$1,000; that he, the defendant, would take up, procure, and obtain a note, made by John B. Jones, Thomas Townsend (the said defendant), Eli Abbott, and Samuel D. Lauderdale, dated Columbus, Mississippi, May 24th, *1839, for \$9,806.50, payable six months after date to the Commercial Bank of Columbus, or order, at their bank; which agreement the defendant wholly failed to perform, although the plaintiff,

time, so as to make the bar complete there, unless such statute go to the extinction of the right itself, and not to the remedy only. But if the right of action on a contract has been extinguished by a statute of limitations in another State, where the parties resided, the courts of Mississippi will give effect to that statute in any suit

brought in this State on such contract. *Perkins v. Guy*, 55 Miss., 163. The rule under the Iowa Rev., allowing as a defence in Iowa, a bar intervening under the laws of another State where the defendant has resided—applies whether or not the cause of action arose in Iowa. *Davis v. Harper*, 48 Iowa, 513.

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upon his part, fully performed the said agreement. Other counts will be added in the declaration.

"Attest:

CRABB & COCHRAN,
Plaintiff's Attorneys."

The declaration set forth the transaction with more particularity, and also contained the common money counts and an account stated.

To the first count the plaintiff in error pleaded in bar:—First, that the promise was unwritten, made in Mississippi, and to be performed there, and was made more than three years before this suit; and that, by the statute of limitations of Mississippi, the right of action is barred upon such a promise after three years. Secondly, the same matter, with an averment that the cause of action accrued in Mississippi more than three years before this suit. To these pleas there was a demurrer. To this first count the plaintiff in error further pleaded, as to parcel thereof, *non-assumpsit*, and as to the residue, a former action brought and judgment recovered by the defendant in error against him. The defendant in error joined issue on the parts of this plea respectively, to the court and to the country.

To the whole declaration the plaintiff in error pleaded *non-assumpsit*, on which issue was joined; and also that the causes of action accrued more than three years before suit, averring himself to have been a citizen of Mississippi, and that the promises were there made and there to be performed; and to this plea the defendant in error demurred.

In this state of the pleadings, the cause came on for trial, on the 7th of December, 1846, when the following proceedings were had.

"This day came said parties, by their attorneys, and the demurrer to the first three pleas of the said defendant, by him above pleaded, coming on to be heard, and having been fully argued by counsel, and understood by the court, it is adjudged by the court that the said first three pleas by the defendant above pleaded, and the matters therein alleged, are insufficient in law to bar the said plaintiff from having or maintaining his said action against said defendant; and the court doth accordingly sustain the said demurrer. And as to so much of the said fourth plea by the said defendant, by him above pleaded, as alleged a former recovery of three thousand four hundred and *fifty-one dollars and eighty-eight cents, [*409 in the District Court of the United States for the Northern District of Mississippi, on account of the undertaking of the said defendant 'to pay three thousand dollars, or

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any other part or parcel of the said note, made by the said John B. Jones, Thomas Townsend, Eli Abbott, and Samuel D. Lauderdale, in consideration that the said plaintiff would pay three thousand dollars, or any other part or parcel of the note made by Thomas Townsend, A. F. Young, Andrew Weir, and Henry Buchanan,' and set out at large in said count, on which issue was joined to the court, the record therein referred to being seen and inspected by the court, and the same being fully considered, the court adjudged that there is such a record, as alleged in said plea, of a recovery on the promise of the said Thomas Townsend to pay on the note of the said John B. Jones, Thomas Townsend, Eli Abbott, and Samuel D. Lauderdale, as mentioned in said plea, the like amount that should be paid by plaintiff on the note of the said Thomas Townsend, A. F. Young, Andrew Weir, and Henry Buchanan. And as to the residue of said fourth plea, and the fifth plea, upon which issue was taken to the country, thereupon came a jury of good and lawful men, to wit, Amos Briggs, and eleven others, who, being impannelled, tried, and sworn the truth to say upon the issues joined, upon their oaths do say, they find the issues in favor of the plaintiff, and assess his damages at four thousand six hundred and forty-five dollars. It is therefore considered by the court, that the plaintiff recover of said defendant said sum of four thousand six hundred and forty-five dollars, the damages by the jury assessed as aforesaid, in manner and form aforesaid, together with the costs in this behalf expended."

Townsend sued out a writ of error, and brought the case up to this court.

It was argued by *Mr. Key*, for the plaintiff in error; and *Mr. Lawrence* and *Mr. Badger*, for the defendant in error.

Mr. Key.

The questions now presented for consideration arise from the pleas of Townsend to the declaration.

To the first three pleas the plaintiff below demurred; and it is submitted, that the court erred in submitting this demurrer.

1. The substance of these pleas is the bar of the statute of limitations of the State of Mississippi, and it is contended for the plaintiff in error that they were valid pleas. The general principle must be admitted as settled, that, in personal contracts, the *lex loci contractus* governs in all questions relating
 *410] to the construction or validity of the contract, in whatever country or State the action may be brought.

Laws of limitation, it has been generally decided, affect the remedy, and the *lex fori*, or the law of the place where the action is instituted, prevails. But the question now presented is, whether these pleas are not valid, the statute of Mississippi having completely run against the plaintiff Jemison, the bar being perfected, and his remedy in that State extinguished.

It is thought that this is an open question. The decisions of this court, touching the general question as to the effect of statutes of limitation, are to be found in the following cases: —*Hawkins v. Barney*, 5 Pet., 457; *Bank of United States v. Donnelly*, 8 Pet., 361; *McElmoyle v. Cohen*, 13 Pet., 312. The decisions in these cases will be found, upon examination, not to have settled the present question. But see *Leroy v. Crowninshield*, 2 Mason, 151; *Bell v. Morrison*, 1 Pet., 373; *Goodman v. Munks*, 8 Port. (Ala.), 84; *Davis v. Minor and Wife*, 1 How. (Miss.), 184. It will be perceived by the two cases last cited, that the highest court of the State of Alabama has decided in favor of the validity of a plea of limitations of another State, when the bar has been perfected; and the High Court of Errors of the State of Mississippi has affirmed the same principle. In *Leroy v. Crowninshield*, Judge Story felt constrained, by the decisions of the courts of the States in which the parties respectively resided, to decide the question contrary to his own judgment; but the highest courts of the States in which the parties to this suit are respectively resident have decided in accordance with that judgment.

2. Are not these pleas within the *lex fori* of Alabama? It is true they are not pleas of any statute of limitations of that State, but they are framed in conformity with the decisions of the Supreme Court of the State, which declares that a plea of the statute of limitations of another State, if the bar of the statute has been perfected, is a valid plea in the State of Alabama. *Goodman v. Munks*, before cited.

The power of the Supreme Court of the State to decide and settle the law, as to what pleas should be good in the courts of that State, cannot be questioned. The court below should have been guided by this decision, and was bound to adopt it. A fixed and received construction by a State court of its statute laws, must furnish the rule of decision to the Federal courts, and it is immaterial whether the decisions of the State courts are grounded upon statutes of the States, or form a part of the unwritten law; and such decisions are entitled to the same respect as those which are given on the construction

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*411] of local statutes. *Henderson and Wife v. Griffin*, 5 Pet., 154; *Jackson v. Chew*, 12 Wheat., 153; *Leroy v. Crowninshield*, 2 Mason, 151.

The decision of a question of local law by the highest tribunal of a State is considered final by this court. *Rowan et al. v. Runnels*, 5 How., 134. It is submitted, therefore, that the first three pleas are good, according to the settled law of Alabama.

3. The plaintiff in error contends, that the fourth plea should have been adjudged a bar to the whole action in the court below. The plea states, that, upon the identical cause of action, a suit had been instituted by the plaintiff below in a court of competent jurisdiction in the State of Mississippi. A judgment was obtained in favor of said plaintiff, and was subsequently paid and satisfied.

A judgment obtained in one State is conclusive in every other State, and extinguishes the original ground of action. *Green v. Sarmiento*, Pet. C. C., 74.

It cannot be contended that the judgment referred to applied to a part only of the said Jemison's claim. The record shows, that the whole claim was included in the suit in Mississippi. But, admitting the suit to have been brought for a portion only, still the same principle applies; the cause of action was founded upon one promise. A plaintiff cannot divide one entire cause of action, so as to maintain two suits upon it, without the defendant's consent; if he attempts so to do, a recovery in the first suit, though for less than his whole demand, is a bar to the second. *Ingraham v. Hall*, 11 Serg. & R. (Pa.), 78; *Crips v. Talvande*, 4 McCord (S. C.), 20; *Smith v. Jones*, 15 Johns. (N. Y.), 229; *Mandeville v. Welch*, 5 Wheat., 277; *Tiernan v. Jackson*, 5 Pet., 580; *Shankland v. Corp. of Washington*, Id., 390.

If it be contended that the judgment obtained in Mississippi was pleaded in the said fourth plea only to a portion of the declaration, and that it was not pleaded in bar of the whole action, and that the point was not presented to the court below, and that this court will not reverse the judgment upon a point which was not presented for the consideration of the court, I refer to *Stephen on Pleading*, pp. 117, 118, 119, 120, 144, 145, 146; *Slacum v. Pomery*, 6 Cranch, 221; *Cohens v. State of Virginia*, 6 Wheat., 409, 410; *United States v. Carlton*, 1 Gall., 400.

The counsel for the defendant in error contended,—

First, that the three pleas of the statute of limitations were bad in law, and therefore were properly overruled by the

court. *The limitation of actions by statute, affecting only the remedy and not the merits, furnishes a rule [*412 of decision only in the forum of that country which makes the statute, and not touching the merits, nor being any part of the contract, cannot be extended to the courts of another country. *Williams v. Jones*, 13 East, 439; *McElmoyle v. Cohen*, 13 Pet., 312; Story, Conf. of Laws, §§ 576 to 582.

The statute of Mississippi is merely a statute of limitations, affects the remedy or right of action only, and does not extinguish the debt, the claim or title *ipso facto*, and make it a nullity. This appears both from the plea and from the statute itself. Miss. Code, 825, 828.

Secondly. If in any case the statute of Mississippi could be used to affect the action in Alabama, it must be where the party sued had always been, from the time the cause of action accrued, until the bar became complete, within the jurisdiction, and liable to the process, of the courts of Mississippi. But the pleas here do not show this, the averment being, "that, on the 1st of January, 1839, he was, and from thence hitherto hath been, and still is, a resident and citizen of the State of Mississippi, and not elsewhere." But residence and actual presence are not in law identical. Story, Conf. of Laws, §§ 46, 47.

Absence from a State does not imply loss either of citizenship or residence; whether either is lost depends upon the intent of the party, and other matters. If the absence be temporary, and with an intent to return, no loss of citizenship or residence follows. A judge of this court while in Washington during the term, a gentleman visiting a watering-place in another State during the summer, a merchant visiting New York to purchase goods, a member of Congress attending a session of the Senate or House, are all and each, during the whole time of such temporary absence, citizens, and in law residents, of the States in which they have their permanent domicil.

It was incumbent upon the plaintiff in error, therefore, to show by precise and accurate averment, not that he was a citizen and resident, but that he was not in fact absent from his residence for three years from the time the cause of action accrued, and therefore for the whole time amenable to process under the law of Mississippi.

If, then, consistently with the averment in the plea, he might have been absent for a day, the plea is bad; but here, consistently with his averment, he might have been absent for the whole three years.

Thirdly. That upon the record nothing was submitted to

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the jury but what, according to the state of the pleading, *413] ought *to have been submitted, and, according to strict technical rules, must have been submitted; that it does not appear, and will not be intended, that any damages were given on account of matters out of the issues, or which should have been excluded from consideration by reason of the judgment given by the court upon the plea of former recovery, or the state of the pleadings.

Mr. Justice WAYNE delivered the opinion of the court.

This suit has been brought here from the District Court of the United States for the Middle District of Alabama. The defendant in the court below, appellant here, besides other pleas, pleaded that the cause of action accrued in Mississippi more than three years before the suit was brought; and that the Mississippi statute of limitations barred a recovery in the District Court of Alabama. The plaintiff demurred to the plea. The court sustained the demurrer.

We do not think it necessary to do more than to decide this point in the case.

The rule in the courts of the United States, in respect to pleas of the statutes of limitation has always been, that they strictly affect the remedy, and not the merits. In the case of *McElmoyle v. Cohen*, 13 Pet., 312, this point was raised, and so decided. All of the judges were present and assented. The fullest examination was then made of all the authorities upon the subject, in connection with the diversities of opinion among jurists about it, and of all those considerations which have induced legislatures to interfere and place a limitation upon the bringing of actions.

We thought then, and still think, that it has become a formulary in international jurisprudence, that all suits must be brought within the period prescribed by the local law of the country where the suit is brought,—the *lex fori*; otherwise the suit would be barred, unless the plaintiff can bring himself within one of the exceptions of the statute, if that is pleaded by the defendant. This rule is as fully recognized in foreign jurisprudence as it is in the common law. We then referred to authorities in the common law, and to a summary of them in foreign jurisprudence. Burge's Com. on Col. and For. Laws. They were subsequently cited, with others besides, in the second edition of the Conflict of Laws, 483. Among them will be found the case of *Leroy v. Crowninshield*, 2 Mason, 151, so much relied upon by the counsel in this case.

Neither the learned examination made in that case of the

reasoning of jurists, nor the final conclusion of the judge, in *opposition to his own inclinations, escaped our attention. Indeed, he was here to review them, with those [*414 of us now in the court who had the happiness and benefit of being associated with him. He did so with the same sense of judicial obligation for the maxim, *Stare decisis et non quieta movere*, which marked his official career. His language in the case in Mason fully illustrates it:—"But I do not sit here to consider what in theory ought to be the true doctrines of the law, following them out upon principles of philosophy and juridical reasoning. My humbler and safer duty is to administer the law as I find it, and to follow in the path of authority, where it is clearly defined, even though that path may have been explored by guides in whose judgment the most implicit confidence might not have been originally reposed." Then follows this declaration:—"It does appear to me that the question now before the court has been settled, so far as it could be, by authorities which the court is bound to respect." The error, if any has been committed, is too strongly engrafted into the law to be removed without the interposition of some superior authority. Then, in support of this declaration, he cites Huberus, Voet, Pothier, and Lord Kames, and adjudications from English and American courts, to show that, whatever may have been the differences of opinion among jurists, the uniform administration of the law has been, that the *lex loci contractus* expounds the obligations of contracts, and that statutes of limitation prescribing a time after which a plaintiff shall not recover, unless he can bring himself within its exceptions, appertain *ad tempus et modum actionis instituendæ* and not *ad valorem contractus*. *Williams v. Jones*, 13 East, 439; *Nash v. Tupper*, 1 Cai. (N. Y.), 402; *Ruggles v. Keeler*, 8 Johns. (N. Y.), 263; *Pearsall v. Dwight*, 2 Mass., 84; *Decouche v. Savetier*, 3 Johns. (N. Y.) Ch., 190, 218; *McCluny v. Silliman*, 3 Pet., 276; *Hawkins v. Barney*, 5 Pet., 457; *Bank of the United States v. Donnally*, 8 Pet., 361; *McElmoyle v. Cohen*, 13 Pet., 312.

There is nothing in *Shelby v. Guy*, 11 Wheat., 361, in conflict with what this court decided in the four last-mentioned cases. Its action upon the point has been uniform and decisive. In cases before and since decided in England, it will be found there has been no fluctuation in the rule in the courts there. The rule is, that the statute of limitations of the country in which the suit is brought may be pleaded to bar a recovery upon a contract made out of its political jurisdiction, and that the limitation of the *lex loci contractus*

cannot be. 2 Bing., N. C., 202, 211; *Don v. Lippmann*, 5 Cl. & F., 1, 16, 17. It has become, as we have already said, *415] a fixed rule of the **jus gentium privatum*, unalterable, in our opinion, either in England or in the States of the United States, except by legislative enactment.

We will not enter at large into the learning and philosophy of the question. We remember the caution given by Lord Stair in the supplement to his *Institutes* (p. 852), about citing as authorities the works and publications of foreign jurists. It is appropriate to the occasion, having been written to correct a mistake of Lord Tenterden, to whom no praise could be given which would not be deserved by his equally distinguished contemporary, Judge Story. Lord Stair says,—“There is in Abbott’s *Law of Shipping* (5th edition, p. 365) a singular mistake; and, considering the justly eminent character of the learned author for extensive, sound, and practical knowledge of the English law, one which ought to operate as a lesson on this side of the Tweed, as well as on the other, to be a little cautious in citing the works and publications of foreign jurists, since, to comprehend their bearings, such a knowledge of the foreign law as is scarcely attainable is absolutely requisite. It is magnificent to array authorities, but somewhat humiliating to be detected in errors concerning them;—yet how can errors be avoided in such a case, when every day’s experience warns us of the prodigious study necessary to the attainment of proficiency in our own law? My object in adverting to the mistake in the work referred to is, not to depreciate the author, for whom I entertain unfeigned respect, but to show that, since even so justly distinguished a lawyer fails when he travels beyond the limits of his own code, the attempt must be infinitely hazardous with others.”

We will now venture to suggest the causes which misled the learned judge in *Leroy v. Crowninshield* into a conclusion, that, if the question before him had been entirely new, his inclination would strongly lead him to declare, that where all remedies are barred or discharged by the *lex loci contractus*, and have operated upon the case, then the bar may be pleaded in a foreign tribunal, to repel any suit brought to enforce the debt.

We remark, first, that only a few of the civilians who have written upon the point differ from the rule, that statutes of limitation relate to the remedy and not to the contract. If there is any case, either in our own or the English courts, in which the point is more discussed than it is in *Leroy v. Crowninshield*, we are not acquainted with it. In every case but

one, either in England or in the United States, in which the point has since been made, that case has been mentioned, and it has carried some of our own judges to a result which Judge Story himself did not venture to support.

*We do not find him pressing his argument in *Leroy v. Crowninshield* in the Conflict of Laws, in which it [*416 might have been appropriately done, if his doubts, for so he calls them, had not been removed. Twenty years had then passed between them. In all that time, when so much had been added to his learning, really great before, that by common consent he was estimated in jurisprudence *par summis*, we find him, in the Conflict of Laws, stating the law upon the point, in opposition to his former doubts, not in deference to authority alone, but from declared conviction.

The point had been examined by him in *Leroy v. Crowninshield* without any consideration of other admitted maxims of international jurisprudence, having a direct bearing upon the subject. Among others, that the obligation of every law is confined to the State in which it is established, that it can only attach upon those who are its subjects, and upon others who are within the territorial jurisdiction of the State; that debtors can only be sued in the courts of the jurisdiction where they are; that all courts must judge in respect to remedies from their own laws, except when conventionally, or from the decisions of courts, a comity has been established between States to enforce in the courts of each a particular law or principle. When there is no positive rule, affirming, denying, or restraining the operation of foreign laws, courts establish a comity for such as are not repugnant to the policy or in conflict with the laws of the State from which they derive their organization. We are not aware, except as it has been brought to our notice by two cases cited in the argument of this cause, that it has ever been done, either to give or to take away remedies from suitors, when there is a law of the State where the suit is brought which regulates remedies. But for the foundation of comity, the manner of its exercise, and the extent to which courts can allowably carry it, we refer to the case of the *Bank of Augusta v. Earle*, 13 Pet., 519, 589; Conflict of Laws, *Comity*.

From what has just been said, it must be seen, when it is claimed that statutes of limitation operate to extinguish a contract, and for that reason the statute of the State in which the contract was made may be pleaded in a foreign court, that it is a point not standing alone, disconnected from other received maxims of international jurisprudence. And it may well be asked, before it is determined otherwise, whether con-

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tracts by force of the different statutes of limitation in States are not exceptions from the general rule of the *lex loci contractus*. There are such exceptions for dissolving and dis-
 *417] charging contracts out *of the jurisdiction in which they were made. The limitations of remedies, and the forms and modes of suit, make such an exception. Conf. of Laws, 271, and 524 to 527. We may then infer that the doubts expressed in *Leroy v. Crowninshield* would have been withheld, if the point had been considered in the connection we have mentioned.

We have found, too, that several of the civilians who wrote upon the question did so without having kept in mind the difference between the positive and negative prescription of the civil law. In doing so, some of them—not regarding the latter in its more extended signification as including all those bars or exceptions of law or of fact which may be opposed to the prosecution of a claim, as well out of the jurisdiction in which a contract was made as in it—were led to the conclusion, that the prescription was a part of the contract, and not the denial of a remedy for its enforcement. It may be as well here to state the difference between the two prescriptions in the civil law. Positive, or the Roman *usucaptio*, is the acquisition of property, real or personal, immovable or movable, by the continued possession of the acquirer for such a time as is described by the law to be sufficient. Erskine's Inst., 556. "*Adjectio domini per continuationem possessionis temporis legi definiti.*" Dig., 3.

Negative prescription is the loss or forfeiture of a right, by the proprietor's neglecting to exercise or prosecute it during the whole period which the law hath declared to be sufficient to infer the loss of it. It includes the former, and applies also to all those demands which are the subject of personal actions. Erskine's Inst., 560, and 3 Burge, 26.

Most of the civilians, however, did not lose sight of the differences between these prescriptions, and if their reasons for doing so had been taken as a guide, instead of some expressions used by them, in respect to what may be presumed as to the extinction or payment of a claim, while the plea in bar is pending, we do not think that any doubt would have been expressed concerning the correctness of their other conclusion, that statutes of limitation in suits upon contracts only relate to the remedy. But that was not done, and, from some expressions of Pothier and Lord Kames, it was said, "If the statute of limitations does create, *proprio vigore*, a presumption of the extinction or payment of the debt, which all nations ought to regard, it is not easy to see why

the presumption of such payment, thus arising from the *lex loci contractus*, should not be as conclusive in every other place as in the place of the contract." And that was said in *Leroy v. Crowninshield*, in opposition to *the declaration of both of those writers, that in any other place [*418 than that of the contract such a presumption could not be made to defeat a law providing for proceedings upon suits. Here, turning aside for an instant from our main purpose, we find the beginning or source of those constructions of the English statutes of limitation which almost made them useless for the accomplishment of their end. Within a few years, the abuses of such constructions have been much corrected, and we are now, in the English and American courts, nearer to the legislative intent of such enactments.

But neither Pothier nor Lord Kames meant to be understood, that the theory of statutes of limitation purported to afford positive presumptions of payment and extinction of contracts, according to the laws of the place where they are made. The extract which was made from Pothier shows his meaning is, that, when the statute of limitations has been pleaded by a defendant, the presumption is in his favor that he has extinguished and discharged his contract, until the plaintiff overcomes it by proof that he is within one of those exceptions of the statute which takes it out of the time after which he cannot bring a suit to enforce judicially the obligation of the defendant. The extract from Lord Kames only shows what may be done in Scotland when a process has been brought for payment of an English debt, after the English prescription has taken place. The English statute cannot be pleaded in Scotland in such a case, but, according to the law of that forum, it may be pleaded that the debt is presumed to have been paid. And it makes an issue, in which the plaintiff in the suit may show that such a presumption does not apply to his demand; and that without any regard to the prescription of time in the English statute of limitation. It is upon this presumption of payment that the conclusion in *Leroy v. Crowninshield* was reached, and as it is now universally admitted that it is not a correct theory for the administration of statutes of limitation, we may say it was in fact because that theory was assumed in that case that doubts in it were expressed, contrary to the judgment which was given, in submission to what was admitted to be the law of the case. What we have said may serve a good purpose. It is pertinent to the point raised by the pleading in the case before us, and in our judgment there is no error in the District Court's having sustained the demurrer.

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Before concluding, we will remark that nothing has been said in this case at all in conflict with what was said by this court in *Shelby v. Guy*, 11 Wheat., 361. The distinctions made by us here between statutes giving a right to property *419] *from possession for a certain time, and such as only take away remedies for the recovery of property after a certain time has passed, confirm it. In *Shelby v. Guy* this court declared that, as by the laws of Virginia five years' *bona fide* possession of a slave constitutes a good title upon which the possessor may recover in detinue, such a title may be set up by the vendee of such possessor in the courts of Tennessee as a defence to a suit brought by a third party in those courts. The same had been previously ruled in this court in *Brent v. Chapman*, 5 Cranch, 358; and it is the rule in all cases where it is declared by statute that all rights to debts due more than a prescribed term of years shall be deemed extinguished, and that all titles to real and personal property not pressed within the prescribed time shall give ownership to an adverse possessor. Such a law, though one of limitation, goes directly to the extinguishment of the debt, claim, or right, and is not a bar to the remedy. *Lincoln v. Battelle*, 6 Wend. (N. Y.), 475. Conf. of Laws, 582.

In *Lincoln v. Battelle*, 6 Wend. (N. Y.), 475, the same doctrine was held. It is stated in the Conflict of Laws, 582, to be a settled point. The courts of Louisiana act upon it. We could cite other instances in which it has been announced in American courts of the last resort. In the cases of *De la Vega v. Vianna*, 1 Barn. & Ad., 284, and the *British Linen Co. v. Drummond*, 10 Barn. & C., 903, it is said, that, if a French bill of exchange is sued in England, it must be sued on according to the laws of England, and there the English statute of limitations would form a bar to the demand if the bill had been due for more than six years. In the case of *Don v. Lippmann*, 5 Cl. & F., 1, it was admitted by the very learned counsel who argued that case for the defendants in error, that, though the law for expounding a contract was the law of the place in which it was made, the remedy for enforcing it must be the law of the place in which it is sued. In that case will be found, in the argument of Lord Brougham before the House of Lords, his declaration of the same doctrine, sustained by very cogent reasoning, drawn from what is the actual intent of the parties to a contract when it is made, and from the inconveniences of pursuing a different course. In *Beckford and others v. Wade*, 17 Ves., 87, Sir William Grant, acknowledging the rule, makes the distinction between statutes merely barring the legal remedy and

such as prohibit a suit from being brought after a specified time. It was a case arising under the possessory law of Jamaica, which converts a possession for seven years under a deed, will, or other conveyance, into a positive absolute title, against all the world,—without exceptions in *favor [*420 of any one or any right, however a party may have been situated during that time, or whatever his previous right of property may have been. There is a statute of the same kind in Rhode Island. 2 R. I. Laws, 363, 364, ed. 1822. In Tennessee there is an act in some respects similar to the possessory law of Jamaica; it gives an indefeasible title in fee simple to lands of which a person has had possession for seven years, excepting only from its operation infants, feme covert, *non compos mentis*, persons imprisoned or beyond the limits of the United States and the Territories thereof, and the heirs of the excepted, provided they bring actions within three years after they have a right to sue. Act of November 16, 1817, ch. 28, §§ 1, 2. So in North Carolina, there is a provision in the act of 1715, ch. 17, § 2, with the same exceptions as in the act of Tennessee, the latter being probably copied substantially from the former. Thirty years' possession in Louisiana prescribes land, though possessed without title and *malâ fide*.

We have mentioned those acts in our own States, only for the purpose of showing the difference between statutes giving title from possession, and such as only limit the bringing of suits. It not unfrequently happens in legislation, that such sections are found in statutes for the limitation of actions. It is in fact because they have been overlooked, that the distinction between them has not been recognized, as much as it ought to have been in the discussion of the point, whether a certain time assigned by a statute, within which an action must be brought, is a part of the contract, or solely the remedy. The rule in such a case is, that the obligations of the contract, upon the parties to it, except in well-known cases, are to be expounded by the *lex loci contractus*. Suits brought to enforce contracts, either in the State where they were made, or in the courts of other States, are subject to the remedies of the forum in which the suit is, including that of statutes of limitation.

Judgment affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Alabama, and was argued by counsel. On consid-

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eration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed, with costs, and damages at the rate of six per centum per annum.



*421] *JOHN DOE, EX DEM. OF CATHARINE LOUISA BARBARIE, ANN BILLUP BARDE, DANIEL R. BROWER AND ANN B. BROWER, HIS WIFE, CURTIS LEWIS AND ISABELLA LEWIS, HIS WIFE, JOHN T. LACKEY AND MARGARET LACKEY, HIS WIFE, HEIRS AND LEGAL REPRESENTATIVES OF ROBERT FARMER, DECEASED, v. MIGUEL D. ESLAVA, AND OTHERS, TENANTS IN POSSESSION.

There were two conflicting claims to land in that part of Louisiana west of the Perdido River; one founded upon a French grant in 1757, with possession continuing down to 1787; the other founded upon a Spanish grant in 1788, with possession continuing down to 1819.

Both these claims were confirmed by Congress.

In an ejectment suit, where the titles were in conflict, the State court instructed the jury, that the confirmations balanced each other, and they must look to other evidences of title in order to settle the rights of the parties.¹

The judgment of the court being, ultimately, in favor of the party who claimed under the Spanish grant, this court will not, under the circumstances of the case, disturb that judgment.²

The fifth section of the act of Congress passed on the 8th of May, 1822, giving certain powers to the registers and receivers of the land office, did not confer upon them the power of finally adjudicating titles to land.³

THIS case was brought up from the Supreme Court of Alabama, by a writ of error issued under the twenty-fifth section of the Judiciary Act.

It was an ejectment brought, in April, 1838, in the Circuit Court for Mobile County and State of Alabama, by the heirs of Robert Farmer against Miguel D. Eslava, the Mayor and Aldermen of the city of Mobile, and Joseph Clemens. Eslava afterwards obtained leave to sever in his plea, and thenceforward this suit was carried on against him alone.

The action was brought to recover the following lot of ground in the city of Mobile, viz.:—

“Beginning at a post on the line of the claim of William McVoy, at the distance of twenty-four feet north of the north-east angle of Government Street and Emanuel Street; run-

¹ See *Berthold et al. v. McDonald et al.*, 22 How., 340.

³ APPLIED. *Tate et al. v. Carney et al.*, 24 How., 361. CITED. *Doe v. City of Mobile*, post, *467.

² CITED. *Lanfeur v. Hunley*, 4 Wall., 210.

ning thence north sixty-nine degrees east (with the line of McVoy), eighty-nine feet seven inches, to a stake, the south-east angle of a brick cotton-shed, bearing north seventeen degrees west, distant forty-two feet one inch; thence north seventeen degrees forty minutes west, two hundred and twenty-four feet, to the south boundary of the bakehouse lot; thence with said south boundary, south seventy-five degrees fifteen minutes west, eighty-nine feet six inches, to the east boundary of Emanuel Street; thence with said street, south seventeen degrees forty minutes east, two hundred and thirty-four feet, to the place of beginning; containing twenty thousand four hundred and ninety-five superficial feet with the appurtenances."

Instead of giving a chronological narrative of the events *connected with the titles of the plaintiff and defendant, it will best place them before the reader to trace [*422 out each title separately.

In May, 1846, the cause came on for trial, when the parties exhibited the following deeds and papers in support of their respective claims.

The title of the plaintiff was as follows:—

1. A patent issued on the 19th of April, 1759, at New Orleans, by Louis de Kerline, Chevalier of the royal and military Order of St. Louis, captain of a vessel of his Majesty, and Governor of the Province of Louisiana, and John Baptiste Claude Bobé de Cloreaux, Counsellor of the King in his Council, Commissary of the Marine, Ordinator in the said Province, to Mr. Grondel. The patent was for a piece of land near the place of the new quarters, at Mobile, called the direction fronting the fort, consisting of about fourteen toises of front upon the esplanade, of the depth which remains of the establishment of the king's bakehouse (*boulangerie du roi*).

2. Mesne conveyances from Grondel to Robert Farmer.

3. That Farmer was a major in the British army, and lived in Mobile; and that when the Spaniards took possession under the treaty which followed upon the close of the war of the American Revolution, Farmer's house was burned and his family moved away to some other residence.

4. After the acquisition and reduction into possession of this country by the United States, Congress passed an act, upon the 25th of April, 1812, appointing a commissioner to investigate the claims to land within it, whose report was to be laid before Congress. In January, 1814, the report of the commissioner, Mr. Crawford, was laid before Congress. 3 Am. State Papers, 6, tit. "Public Lands." This claim appears in the report, but the abstracts show no evidence of inhabita-

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tion or cultivation, and the recommendation was, that those claims only should be confirmed in which this proof was made. 3 Am. State Papers, 32.

On the 3d of March, 1819, Congress passed an act confirming certain claims, and organizing a board of commissioners, consisting of the register and receiver, to receive evidence of "all grants, orders of survey, &c., derived from the French, British, and Spanish governments"; and the commissioners were empowered "to inquire into the justice and validity of the claims," and in every case to ascertain the facts relative to their inhabitation and cultivation, and the nature of the survey, if any, abstracts of which evidence were to be reported to the Secretary of the Treasury, to be by him laid before Congress.

*423] *In June, 1820, the claim was presented by Louis de Vobiscey, who had married one of the daughters of Farmer, in the following manner.

"To the Register and Receiver of Public Moneys, acting as Commissioners of Land Claims at Jackson Court-House, Mississippi.

"Gentlemen,—You are hereby notified that the following claims of the heirs of Robert Farmer are now revived, and additional evidence offered in support thereof, to wit: a lot in the city of Mobile, situate opposite to Fort Charlotte, and running fourteen toises (eighty-four feet) front on Government Street, and running back to the public bakehouse (about three hundred feet), which said lot was granted by the French government, by patent bearing date 19th April, 1757, to Mr. Grondel, who, by deed bearing date 22d August, 1757, sold it to Bertrand Guichandene, who, by deed of sale bearing date 18th March, 1759, sold it to Count Pascher, by whom, by deed, lost by time or accident, it was transferred to Robert Farmer, who, according to the evidence hereto annexed, inhabited the same upwards of twenty years, and which is now in my possession in right of the heirs of said Farmer. A translation of the patent is recorded in book C, page 1842, in the books of the former commissioner, but no conveyances under said patent. Therefore, I respectfully request that the said papers herewith filed may be recorded in the order in which they are now presented.

"LOUIS G. DE VOBISCEY."

At the same time, the depositions of Mrs. Bennett and John Baptiste Trainer were filed, showing that Farmer lived

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on the lot for twenty years; that, on the taking of the town by the Spaniards, the house was burned, and the family moved away.

Upon this evidence, the commissioners made the following report.

“Register of Evidence collected in Relation to Lots in the Town of Mobile.

“No. 27. By whom claimed, Heirs of Robert Farmer. Original claimant, Grondel. Nature of claim, and from what authority derived, French patent. Date of claim, 19th April, 1757. Quantity front, in feet, —; 84 deep; area in feet, —. Where situated, Government Street. By whom issued, French government. Cultivation and inhabitation: A house *built, in which R. Farmer lived for twenty [*424 years, and until the Spaniards took possession of the country.

“*Land Office, Jackson Court-House, July 11th, 1820.*

“W. BARTON, *Reg.*

WM. BARNETT, *Rec'r.*

“Attest:

JOHN ELLIOTT, *Clerk.*”

On the 8th of May, 1822, Congress passed an act, entitled “An act confirming claims to lots in the town of Mobile, and to land in the former Province of West Florida, which claims have been reported favorably on by the commissioners appointed by the United States.” Under this act the following proceedings were had by the commissioners, William Crawford, by W. Barton, and William Barnett, register and receiver.

“Transcript from the Register of Certificates granted for Claims to Lots in the Town of Mobile, in the District of Jackson Court-House, Mississippi, contained in Report No. 7 of the Register and Receiver on the Town Lots, and confirmed by virtue of the Act of Congress passed 8th of May, 1822, entitled ‘An act confirming Claims to Lots in the Town of Mobile,’ &c.

“Number of certificate, 15. Number of claim, 27. Number of report, 7. Present claimants, Heirs of Robert Farmer. Original claimant, Grondel. Nature of claim, French patent. Quantity conferred, front —, 84 deep, area —. Where situated, Government Street, Town of Mobile.

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"Register's Department, Land Office, Jackson Court-House, Mississippi, January 1st, 1823.

"W. BARTON, *Agent*.

"Register of Locations issued for confirmed Claims to Lots in the City of Mobile.

"Date of warrant, 15th November, 1827. Number of warrant, 401. Number of certificate, 15. Number of claim, 27. Number of report, 17. Quantity, ——. Claimant, Heirs of Farmer. Where situated, In Mobile. By whom located, ——. In what manner located, ——. In conformity to the extract of title attached, say 14 toises front, running to the lot of the bakehouse, formerly known to be the king's bakehouse."

5. The plaintiff's next evidence in the chain of title was a patent or quitclaim from the United States, which was as follows:—

*425] "The United States of America, to all to whom these presents shall come, greeting :

"Whereas there has been deposited in the General Land Office a certificate (No. 15) of the register and receiver of the land office of St. Stephen's, with a plat of survey of the lot of land therein mentioned, under the provisions of the act of Congress approved on the 8th day of May, 1822, entitled 'An act confirming claims to lots in the town of Mobile, and to land in the former Province of West Florida, which claims have been reported favorably on by the commissioners appointed by the United States,' as the claim of the heirs of Robert Farmer, in right of Philip Gonjon de Grondel, numbered twenty-seven, in abstract numbered seven of the register and receiver, and as being bounded and described as follows, to wit: Beginning at a post on the line of the claim of William McVoy, at the distance of twenty-four feet north of the northeast angle of Government Street and Emanuel Street; running thence north sixty-nine degrees east (with the line of McVoy), eighty-nine feet seven inches, to a stake, the southeast angle of a brick cotton-shed, bearing north seventeen degrees west, distant forty-two feet one inch; thence north seventeen degrees forty minutes west, two hundred and twenty-four feet, to the south boundary of the bakehouse lot; thence with said south boundary, south seventy-five degrees fifteen minutes west, eighty-nine feet six inches, to the east boundary of Emanuel Street; thence with

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said street, south seventeen degrees forty minutes east, two hundred and thirty-four feet, to the place of beginning; containing twenty thousand four hundred and ninety-five superficial feet, English measure, and being a lot in the city of Mobile, in the State of Alabama, in township four south, of range one west, in the district of lands subject to sale at St. Stephen's, Alabama: Now, know ye, that the United States of America, in consideration of the premises, and in conformity with the said act of Congress, have remised, released, and for ever quitclaimed, and by these presents do remise, release, and for ever quitclaim, unto the said heirs of Robert Farmer, and to their heirs, the said land above described, subject to any just claim or claims to all and every part thereof, of all and every person or persons, bodies politic or corporate, derived from the United States, or from either the British, French, or Spanish authorities: To have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, subject to any such just claim or claims as aforesaid, unto them, the said heirs of Robert Farmer, and to their heirs and assigns for ever, so that neither the *United States, [*426 [n]or any other person claiming under them, except as is provided in said act and the reservation aforesaid, may or can set up any right or title thereto.

"In testimony whereof, I, Martin Van Buren, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

"Given under my hand, at the city of Washington, the 14th day of November, in the year of our Lord 1837, and of the independence of the United States the sixty-second.

"MARTIN VAN BUREN,
by A. VAN BUREN, *Secretary*.

"By the President: JOSEPH S. WILSON,
Acting Recorder of Gen. Land Office, ad. in."

6. The last evidence in the chain of the plaintiff's title was proof that the lessors of the plaintiff were the heirs of R. Farmer.

Defendant's Title.

The defendant then offered in evidence the following, viz:—

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1. "To his Excellency Stephen Meiro, Colonel of the Royal Armies, Political and Military Governor of the City of New Orleans and Province of Louisiana, &c.

"Elizabeth Fonnerette, an inhabitant within the jurisdiction of Mobile, with due respect prays your Excellency, and says, that there is in this town a lot of ground, containing ten toises in breadth by twenty-six toises in length, situate on Government Street, opposite the house and lot of Anthony Narbonne, formerly belonging to Mr. Farmer, which lot has not until the present time been claimed by the proprietor or by any agent in his behalf. In consideration of all which, your petitioner humbly hopes, from the goodness of your Excellency, that you will be pleased to grant her the lot above described, and to order the necessary titles to be issued from the secretary's office of this government; wherefore your petitioner entreats your Excellency may be pleased to grant the lot prayed for, and, in so doing, your petitioner shall record many thanks. Mobile, 15th February, 1788.

(Signed,)

ELIZABETH FONNERETTE.

"I, Viginti Folch, captain of the regiment of Louisiana infantry, political and military commandant of the town of Mobile and its district, &c., do hereby certify that, from the *427] *information which I have received from various inhabitants of this place, it appears that the facts stated by the petitioner are correct and true. Mobile, March 1st, 1788.

"The commandant of Mobile will put the petitioner in possession of the lot of ground for which she solicits a grant, at the spot described in the preceding memorial, provided the same is vacant, and without causing injury to a third person. Let the proceedings of the survey be made out in connection herewith by the surveyor of the Province, to be transmitted to me, in order to provide the petitioner with the corresponding title in form.

(Signed,)

STEPHEN MEIRO. [SEAL.]"

2. A deed from Elizabeth Fonnerette to Fontanella, in 1798.

3. A deed from Fontanella to Orsono, in 1801.

4. A deed from Orsono to Eslava, in 1802.

The plaintiff objected to Nos. 1, 2, and 3, that they had never been presented to the board of commissioners, and that they therefore could not be read in evidence; which objection was overruled, and the plaintiff excepted.

The plaintiff also objected to Nos. 1, 2, and 3, because they were mere copies from the book of Spanish records, and the originals not even accounted for.

To No. 4 the plaintiff objected, because the paper offered was a mere certified copy from the land office, and did not purport to convey any title to the premises; which objection was overruled, and the said papers, Nos. 1, 2, 3, and 4, were read, and the plaintiff excepted. The conveyance signed by Orsono was produced.

5. It has been already mentioned, that, on the 25th of April, 1812, Congress passed an act appointing a commissioner to investigate and report upon such claims. The next step in the defendant's title was the following evidence of the presentation of the defendant's title before the commissioner in 1814.

"To the Commissioner of Land Claims east of Pearl River.

"Sir,—Please take notice, I claim a lot and house by virtue of a bill of sale to me by Joaquin de Orsono, captain of the Louisiana regiment of infantry, civil and military commandant of Mobile, dated the 20th June, 1802.

"KENNEDY & OSBORN,

Attorneys and Agents for Don Miguel Eslava.

"*Louisiana, East of Pearl River, May 24th, 1814.*

"Know all men by these presents, that I, Don Joaquin de *Orsono, captain of the regiment of infantry of Louisiana, commandant civil and military of this town of [*428 Mobile, declare to have sold to Don Miguel Eslava the house pertaining to me, wherein I dwell, upon the lot of ground that I bought of Don Francis Fontanella, and built at my own expense; the which I concede to him, free from all encumbrance, for the sum of two thousand dollars, which I have received down, to my full satisfaction; in virtue of which I yield the right of action and ownership that to the said house I had and held, and cede and transfer the whole to the purchaser, who his right shall have, that as his own he may sell or transfer it at his pleasure, without any person opposing his determination; and that it may thus be evident at all times, and for the time being, I make him another sale of the same tract, and sign the present for his security, in the afore town of Mobile, the 30th day of the month of June, 1802.

By duplicate,

JOAQUIN DE ORSONO.

"Test:

THOMAS PRICE,
CAYETANO PEREZ."

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The commissioner, Mr Crawford, made the following report upon this claim.

" Report No. 11.

"Register of claims to land in the district east of Pearl River, in Louisiana, founded on private conveyances which have passed through the office of the commandant, but founded, as the claimant supposes, on grants lost by time or accident. No. 79. By whom claimed, Miguel Eslava. Original claimant, Joaquin de Orsono. Quantity claimed in feet unknown. Where situated, Mobile. Cultivation and inhabitation, 1800 to 1814. Remarks: Most of those claims of Eslava were purchased at public auction.

" WILLIAM CRAWFORD, Commissioner.

"Remarks. Though the original grants upon which the preceding claims are founded have been lost, yet it is conceived that the claims to such lots as were inhabited and cultivated under the Spanish government, or such as were built upon by permission of the Spanish authorities, ought to be confirmed.

" WILLIAM CRAWFORD, Commissioner."

It has been previously stated, that on the 3d of March, 1819, Congress passed an act organizing a board of commissioners, consisting of the register and receiver, to receive evidence of *grants, and to report to Congress. Under *429] this act the following proceedings took place.

6. A survey, under the following order:—

"Register of Locations issued for Confirmed Claims to Lots in the City of Mobile.

Date of warrant, 10th November, 1827. Number of warrant, 413. Number of certificate, 74. Number of claim, 79. Number of report, 11. Quantity claimed, —. Claimant, Miguel Eslava. Where located, Mobile. By whom located, —. In what manner located, 7,200 square feet, including the original buildings.

*" Surveyor's Office,
Land District east of the Island of New Orleans.*

"In conformity with a certificate, No. 4, warrant No. 235, claim No. 79, report No. 11, from the board of commissioners at Jackson Court-House, I have surveyed for Don Miguel Eslava a lot of ground within the city of Mobile, in township

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No. 4, range No. 1, west of the basis meridian, bounded as follows:—Beginning at the northwest angle of Government and St. Manuel Streets, and extending northward, on St. Manuel Street, two hundred and twenty-six feet, and eastward, on Government Street, one hundred and twelve feet. The copy of the conveyance attached to the warrant calls for one hundred and fourteen feet front on Government Street, but it could not be found without interfering with Joyce's Duplantines lot, containing 25,312 superficial feet, of Parisian measure, and having such shape, form, and marks as are represented in the above description.

“The 29th day of October, 1823.

“SILAS DINSMORE,
Principal Deputy Surveyor.”

This survey was objected to as evidence, as no warrant or order of survey was shown, nor any confirmation authorizing the same; which objection was overruled, and the plaintiff excepted.

7. The defendant then offered the following patent certificate:—

“*Land Office, Jackson Court-House,*
3d September, 1824.”

“In pursuance of an act of Congress passed on the 8th day of May, 1822, entitled ‘An act confirming claims to lots in the town of Mobile,’ &c., we hereby certify, that the claim of *Miguel Eslava, original claimant Joaquin de Orsono, [*480 No. 79, in the report of the commissioners, No. 11, has been confirmed under the said act, and that, on the 29th day of October, 1823, the said claim was regularly surveyed, containing 25,312 superficial feet, of Parisian measure, and designated as a lot of ground within the city of Mobile, in township No 4, range No. 1, west of the basis meridian, bounded and described as per plat, herewith authenticated by Silas Dinsmore, principal deputy surveyor for the said district.

“Now, therefore, be it known, that on the presentation of this certificate to the commissioner of the General Land Office, the said Miguel Eslava shall be entitled to receive a patent for the above-described lot.

“WM. HOWZE, *Register.*
G. B. DAMEROU, *Receiver.*”

The defendant then proved that the signatures to the patent certificate and the certificate of survey were genuine, and that the officers were at the date thereof such as they

purport. This the plaintiff objected to, because not sufficiently authenticated, and for the reasons stated in the objections to the survey. The defendant then offered a report from the land office favorable to his claim, marked No. 7. The claim is found in American State Papers, Vol. III.

The defendant also read the act of Congress of 1822, confirming this claim, and also the act of 1819.

The defendant offered evidence going to prove that Fontanella was in possession of the premises, or a portion of them, in 1801 or 1802; that Orsono afterwards had possession, and built a house thereon; and that, after the date of the bill of sale to Eslava, he (Eslava) exercised acts of ownership over it in making repairs, receiving rent, &c.

That Eslava, on his purchase, obtained the possession, and held it till Vobiscey entered, in 1819; that he rented it out to divers persons; that Vobiscey entered while it was rented by Eslava to a tenant named Ward.

In reply to this, the plaintiff offered evidence to show that one De Vobiscey, who had married one of the heirs of Farmer, in the year 1818 or 1819, took possession peaceably of the said premises, claiming to enter in the assertion of said Farmer's title; and that from that time to the present the said claim has been before the courts of Alabama, as will be seen in the reports of the cases in 2 Stewart, 115, and 3 Stewart & Porter, and 7 Alabama Reports.

The defendant, then, to rebut this possession, produced to *431] the court certified copies of the proceedings against De Vobiscey, marked 8, to show their character, and that De Vobiscey was turned out of possession.

8. The defendant then referred to the original Spanish document set forth under the fifth head of his defence. It was the document signed by Orsono, and in the connection was the proof that Fontanella had been in possession, and had inclosed the lot; that he had sold it to Orsono, who built a house upon the lot; that Eslava, the father of defendant, had been in the receipt of rent, during the Spanish times, from about the time the deed bears date; that he had claimed, and the property had been esteemed as his; that the government of the United States had paid rent to him, for the use made of it by General Wilkinson after the change of flag; that he rented it to other persons, and the property was in his possession until he was interrupted by De Vobiscey in 1819; that in the latter part of 1819 De Vobiscey entered, and Eslava brought a writ of forcible entry, and recovered possession and retained it till 1821, when the judgment was revoked and a writ of restitution awarded; that

afterwards another writ of forcible entry was brought by Eslava against De Vobiscey, and in 1822 a recovery was had and possession recovered; that this possession was retained till the year 1826, when this judgment was revoked, and a writ of restitution awarded; and Hallett, claiming to hold De Vobiscey's title, entered, and the proceedings in an action to try titles on the same day were commenced, and a recovery had, with damages; and a writ of restitution was executed under the judgment of the Supreme Court, referred to in the reports of that case.

The documents five and six were offered together, and the genuineness of the signatures was proved, and the fact that the officers held the appointments specified at the time they bear date.

The report of this claim, and the confirmation of the government, was also read to the jury. The evidence shows that the heirs of Robert Farmer left this country; and that, during the Spanish times, and until the return of De Vobiscey, none were known or heard of in the Province of West Florida as claimants of this lot.

It was in evidence that Orsono, at the time of the deed to him, and from him to Eslava, was the Spanish commandant at Mobile.

Before the jury retired from the bar to consider of their verdict, the court charged them as follows:—That, in considering this case, they were not to regard the title of the United *States to either party, as both were confirmed [*432 equally, and the confirmations balanced each other, and, to decide the controversy, the jury must look to the other evidences of title. The court further instructed the jury, that, if they believed the defendant, Eslava, and those under whom he claimed, had been in possession more than twenty years before the suit was brought under claim of title, it would be sufficient for his defence; and that the conveyances produced would be sufficient to connect the different possessions together. The court further instructed the jury, that, the conveyance to Mrs. Fonnerette being shown, if no adverse or other possession appeared, and no reason to the contrary was shown in evidence, and the possession was found in her vendee, they would be authorized to presume, if they thought proper, that she was in possession under the concession.

The court further charged, that, if they believed that the plaintiff had been out of possession since the death of Farmer, and until the year 1819, though De Vobiscey had then entered, yet, if he was dispossessed by Eslava by recovering

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at law with damages, having been out of possession such length of time, his entry was that of a trespasser, and his possession would not prevent the statute of limitations from continuing to run on account of Eslava, he having been restored by competent tribunals.

Before the jury retired to consult on their verdict, the counsel for the plaintiff requested the court to charge the jury as follows:—

That in this State the jury would not be authorized to presume a grant in favor of a direct adverse possession short of thirty years.

That the title of defendant, before confirmation, was a mere equity, and this is not of that character, of color of title, which would support an adverse possession.

That, in order to sustain the defence under the statute of limitations, there must be twenty years' actual, uninterrupted, adverse possession, and this possession must be clearly defined; which the court charged, but added, that the jury might infer the possession, if they pleased, from the transmission of title from Fonnerette to Fontanella, and from Fontanella to Orsono, and to this defendant.

That the proper concession to Mrs. Fonnerette, her deed to Fontanella, and his deed to Orsono, cannot be received by the jury as evidence of title, so as to connect the defendant's title under his confirmation with them, nor can they look to them as evidence of sales, nor as proof of the consideration, nor as proof of the boundaries claimed.

*433] *That if the jury find that De Vobiscey entered upon the premises in 1818 or 1819, with intent to claim, and did claim, in right of his wife, as one of the heirs of Farmer, and held possession under said title during those portions of time he was successful in litigation, this interrupted the possession; and in order to sustain a title under the statute there must be proof of a clear adverse possession of twenty years prior to the time of the interruption; which the court refused, and the court charged that De Vobiscey was a trespasser.

That neither under the claim of Mrs. Fonnerette, nor under the act of Congress, can the defendant claim more than sixty feet front, and that the survey produced by the defendant cannot control this.

That if defendant has put in a plea for eighty-four feet, and shows title for but sixty feet, without designating the precise location of the sixty, the plaintiff must recover. That the paper title produced by the plaintiff is better than the paper title of the defendant.

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That the act of 1822, confirming defendant's title, relates only to the title as presented to the commissioners, to wit, the deed from Orsono in 1802, while the same act confirms the title of plaintiff, which relates back to the patent of 1757.

That the legal construction of the bill of sale from Orsono to Eslava gives to Eslava no right to the land in controversy.

That if the defendant claims under the title of Mrs. Fonnerette, he cannot acquire by the statute of limitations more than the title calls for, which is sixty feet front.

To all of which charges and refusals to charge by the court, the plaintiff by his counsel excepts, and prays that this bill of exceptions may be signed and sealed by the court, which is done accordingly in term time.

The jury, under these instructions, found a verdict for the defendant, and the case was carried to the Supreme Court of Alabama. Before it came on for trial, the record was amended as follows.

"In Ejectment.

"JOHN DOE, ex dem. of FARMER'S HEIRS, v. M. D. ESLAVA.

"I, Augustus Brooks, clerk of the Circuit Court for the county and State aforesaid, do hereby certify, that it is stated in the original bill of exceptions in this case, that every charge requested by the plaintiff's counsel of the court therein set forth was refused, which statement ought to appear in the transcript of the record, as it is a part of the record, but was *omitted through mistake to be inserted in the transcript made out in the case and sent [*434 to the Supreme Court.

"In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this 30th May, in the year 1846.

[SEAL.]

"A. BROOKS, *Clerk.*

"This record is amended by consent in this:—That it is agreed there is an omission in the bill of exceptions to state that the charges asked for (and appearing in this record) by the plaintiff below were refused by the court, and excepted to by the plaintiff.

"Tuscaloosa, 4th June, 1846.

"GEORGE N. STEWART,
Attorney for Def't in Error."

In April, 1847, the cause came on for argument, when the

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Supreme Court of Alabama affirmed the judgment of the court below. The plaintiff sued out a writ of error, and brought the case up to this court.

It was argued by *Mr. Phillips* and *Mr. Coxe*, for the plaintiff in error, and *Mr. Campbell*, for the defendant in error.

Mr. Phillips, for the plaintiff in error, made the following points.

The Supreme Court of Alabama has declared that the plaintiff's chain of title "gives no legal right to the premises, and that the lessor is not entitled to recover, although no opposing evidence had been offered by defendant." 11 Ala., 1049.

This extraordinary conclusion is predicated upon the position that the title of Farmer was forfeited by the conquest, as well as by the stipulation of the fifth section of the treaty between Great Britain and Spain.

That the estate of individuals is not the subject of forfeiture by act of conquest, is a well-established principle in the law of nations, and one repeatedly recognized by this court. Vattel's Law of Nations, 388; Wheaton's Law of Nations, 63; 8 Wheat., 589; 7 Pet., 86; 10 Id., 326; 12 Id., 412.

Nor does the fifth section of the treaty work this consequence. If, by the law of nations, Farmer's possession would have been secure, would the British government have introduced a treaty stipulation narrowing the right of their own subjects?

"Her Catholic Majesty agrees that the British inhabitants or subjects may retire in full security and liberty when they shall think proper, and may sell their estates, and remove all their effects, as well as their persons, without being restrained *435] in their emigration, under any pretence whatever, except on account of debts or criminal prosecutions; the term limited for this emigration being fixed to the space of eighteen months," &c. But if from the value of their possessions they should not be able to dispose of them, a longer time to be granted, &c. Land Laws, 977.

The just construction of this section would seem to be, to stipulate for emigration and removal of property, and that it is introduced out of abundant caution. But if the party did not choose to emigrate, was there to be a forfeiture of his property upon the expiration of the eighteen months? Or suppose he emigrated within that period, but did not sell, did the lapse of time deprive him of the right to do so? The treaty nowhere expressly declares a forfeiture, and to imply

it in opposition to the principles of the laws of nations could only be justified by imperious necessity.

Whatever may be the power of the sovereign to regulate the ownership of real estate, and to confine it to citizens alone, it would seem that some special action of the Spanish government was necessary, and that neither the conquest nor the treaty, *proprio vigore*, worked a forfeiture of this estate.

But supposing they did, was it not competent for Spain to have relinquished this forfeiture, and may not this government, the successor of Spain, do the same thing? The admission of the premises of the decision does not at all justify its conclusion, "that the lessor had no right to recover, although no opposing evidence had been offered by defendant."

But it may be said that the act of Congress and the patent which affirm the plaintiff's title expressly reserve the rightful claims of all other persons, and that the defendant's title is within that reservation, and consequently stands unaffected by them.

In 1788, Elizabeth Fonnerette applied to the Spanish Commandant Meiro for the lot belonging to Farmer, "which has not until the present time been claimed by the proprietor or by any agent in his behalf"; upon which an order issued to put the petitioner into possession provided the lot was "vacant, and it caused no injury to any one," and with the further direction, that "a survey should be made by the surveyor of the Province, to be transmitted to me in order to provide the petitioner with the corresponding title in form."

This was the whole transaction under the Spanish government. There is no evidence to show that the party was ever put into possession by the officer to whom the order was directed, nor that she had ever obtained the possession in any *other manner;—no proof, therefore, that the inquiry was ever made that the lot was "vacant," and [*436 that the concession would not operate an "injury" to some other person, nor was there ever any "survey" upon which the titles were to be predicated.

It may be remarked, also, that, although this application was made but a few years after the treaty, the lot of Farmer is not spoken of as forfeited, but as unclaimed. The concession to Mrs. Fonnerette gave her no legal title. This is shown,—

1st. By the terms of the concession itself.

2d. By the eighteenth section of the Regulations of Morales, which declares, "that no one of those who have

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obtained the first decree by which the surveyor is ordered to measure it, and by virtue of which they have been put in possession, can be regarded as owners of the land until their real titles are delivered, completed with all the formalities before recited." Land Laws, 984.

3d. By the repeated adjudications of this court, commencing with the case of *De la Croix v. Chamberlain*, in 12 Wheaton, that such claims did not sever the land from the public domain, and that upon the change of government a political obligation alone existed, which the court could not enforce.

The claim of Eslava, however, was not presented to the board as founded upon this concession, but upon a bill of sale from Orsono in 1802; and this was the only paper filed in the land office. The report of the commissioners shows Orsono to be the original claimant, Eslava the present claimant, and states the quantity claimed as unknown.

It is contended by defendant, that the act of 1822 confirmed this claim, and upon the trial a survey was introduced, made by a deputy surveyor of the United States, to show its extent. This evidence was objected to, because by the acts of Congress the register and receiver were to direct the manner in which the locations were to be made, and the survey was made without their authority. The survey contained 25,312 superficial feet, while the act of Congress under which the claim is set up expressly provides that, where the quantity claimed is not ascertained, it shall be for 7,200 square feet, or 60 by 120. This survey, then, was not only made without due warrant, but in face of the act, and has never been recognized by this government. The survey should, therefore, have been rejected by the court.

The defendant also offered in evidence the concession and certain mesne conveyances to Orsono. The original petition upon which the concession is founded is for a lot ten toises (60 feet) in front; but the conveyances all differ as to the dimensions.

*437] *The question now is, What standing has this claim acquired from the action of this government?

As it has been shown that the defendant had only an equity upon the political department, he must be content to take his title with the conditions and under the restrictions which that department has imposed.

The plaintiff having shown a perfect title from the government, the defendant was not at liberty to use in evidence against that title the concession, or the mesne conveyances

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to Orsono, as they had never been presented to the board of commissioners.

The act declares they shall never be "considered or admitted as evidence in any court of the United States against any grant which may hereafter be derived from the United States." Land Laws, 607; *Henderson v. Poindexter*, 12 Wheat., 543; *De la Croix v. Chamberlain*, 12 Wheat., 599; *Strother v. Lucas*, 12 Pet., 448; *Barry v. Gamble*, 3 How., 32.

These words are too emphatic and too general to justify the distinction which was taken; for, whether the deeds were introduced as constituting of themselves a title, or for the purpose of uniting them to some other matter to this end, they equally fall within the words of the statute and the mischief it was intended to guard against.

But supposing all these documents properly before the court, it is still insisted the defendant is without a legal title.

The act of 1822 does not purport a conveyance of title. While its first section in reference to complete grants recognizes them as valid, its other sections, which affect the defendant's claim, look to future action,—“they shall be confirmed.” The final title is reserved to the government until the patent issues. The scope of its provisions, providing for locations by its own tribunals, which are also empowered to decide in cases of conflict, is utterly inconsistent with the idea that the act itself severed the connection of the government.

While, therefore, it is not denied that a complete title to lands may be vested by act of Congress, it is insisted that, under the act of 1822, the title of the government is not divested until the issuing of the patent. *Bagnell v. Broderick*, 13 Pet., 436; *Wilcox v. Jackson*, 13 Pet., 498; *Boatner v. Ventriess*, 4 Cond. L. R., 658.

Stating the case, therefore, most favorably for defendant, it shows that Farmer and Eslava both held claims to the lot in controversy derived from former governments; but these claims gave no title. They have both urged their suits before the *new forum, and Farmer's title has been per- [*438 fected, while Eslava's remains incomplete.

From 1822 to 1837, when the patent issued which divested the government of its title, there was a special tribunal organized by the act of Congress for the adjudication of this conflict. The defendant has appealed to that tribunal and been defeated, or he has abstained for fifteen years from prosecuting his suit where by law he was directed to do it. The record does not authorize us to say upon which horn he is suspended, but his dilemma is the same in either event.

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That this court has jurisdiction of this cause under the twenty-fifth section of the Judiciary Act, reference is made to *Mattheus v. Zane*, 4 Cranch, 382; *Ross v. Barland*, 1 Pet., 662; *Pollard's Heirs v. Kibbe*, 14 Pet., 354.

Mr. Campbell, for the defendant in error, contended,—

1. That these two claims fell within different sections of the confirmatory act of 1822; that of Farmer being provided for in the fourth section, which merely conferred donations, whilst that of Eslava was comprehended within the third section, which recognized preëxisting rights; and that claims founded upon donations must give way to rights already established.

2. (After showing that the Supreme Court of Alabama considered that both parties were protected by the act of Congress, and that, in order to decide between them, the antecedent conditions of the title had necessarily to be considered, *Mr. Campbell* proceeded,) In this posture of the case, the Supreme Court were led to the inquiries, first, whether the title of the lessors of the plaintiff was not forfeited before the action of Congress upon it; and secondly, whether the possession of the defendant had not perfected his title under the Spanish laws of prescription and the Alabama act of limitation.

We contend that the settlement of the contest between these parties is within the competency of the local tribunals, and that a writ of error does not lie to the Supreme Court of the United States upon their judgments. A solution of this question must be found in the twenty-fifth section of the Judiciary Act, and the interpretation given to it by the Supreme Court of the United States.

The title of the lessors of the plaintiff rests upon the authority of no clause in the Constitution, nor is it protected by any treaty. The title was forfeited by the laws of Spain, when it had unquestioned sovereignty over the country, and was not restored by the act of cession of Spain to the French *439] government, nor by any act of the French government. The title of the defendant was valid and operative at the date of the cession to the United States, and is within its protection.

The title of the plaintiff is not held under a statute of the United States. The United States, in the act of 8th May, 1822, disavow in favor of the defendant all title to the lot, and if the plaintiff is to be held as comprehended within the third section of the same act, this disavowal operates in favor of the plaintiff. The question, then, is controlled by the decision of this court in 9 Pet., 224. The court there says,

—"The controversy in the State court was between two titles; the one originating under the French, the other under the Spanish government. It is true, the successful party had obtained a patent from the United States acknowledging the validity of his previous incomplete title under the king of Spain. But this patent did not profess to destroy any previous existing title, nor could it so operate, nor was it understood so to operate by the State court." The court proceeds to show, that the confirmation of the plaintiff's claim could not operate upon a preëxisting title; that the solution of the controversy between the parties depended upon the opinion that the State court held as to the rights under the titles derived from the crowns of France and Spain respectively; and that the Supreme Court was not entitled to review the opinions of the State court on such a title.

The parallelism between the two cases is perfect. The controversy in the present case is between titles having complete evidences of authenticity. The land in dispute had been severed from the national domain for more than half a century before the occupancy of Mobile under the title produced by the lessors of the plaintiff. The measures of a public character by which it had reverted, and the acts under which it had subsequently become private property, were all antecedent to the American acquisition.

The United States had interfered between the parties only so far as to disclaim all estate in the property, and to furnish the highest evidence of that in an act of Congress. The settlement of the controversies under the preëxisting claim could be of no interest to the United States, nor can the mode of settlement of the question call for the interposition of the national tribunals.

The State court gave to the act of Congress of 1822 all the effect that could be derived from it in favor of the lessors of the plaintiff. It did not pretend that the United States could not waive the forfeiture in so far as it affected its own interests, but that it had not attempted to impair any other title.

*The decision was, that the disavowal or relinquishment of the United States, in 1822, did not destroy [*440 the rights that had vested after the forfeiture of the British grant, and before the passage of the subsequent act of the United States in 1822. This opinion receives full confirmation from the plain declaration in the act of 1822. Congress expressly declares that it is not to be construed so as to affect any other title, but simply to amount to a relinquishment of the title of the United States. The Supreme Court has re-

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peatedly held, that a confirmation in such terms had no relation so as to affect the vested rights of other persons. *Les Bois v. Bramell*, 4 How., 459; *Barry v. Gamble*, 3 How., 32.

The decision of the State court upon the effect of the act of limitations is clearly not revisable by the Supreme Court of the United States. The State court held that the laws of prescription ran in favor of the defendants, from the time they entered into possession, claiming title. The Supreme Court has acknowledged in several instances the effect of the statutes of limitation upon French titles, and that those acts are not obstructed by the statutes of the United States proposing inquiries into the character and validity of titles. The court held that a party, whose claim had been forfeited by neglect to present it, was entitled to the benefit of the possession held under the Spanish laws of prescription before the cession, and to the benefit of the local laws of prescription. *Strother v. Lucas*, 12 Pet., 456, 461; Judge Catron's Opinion, 468, 469, 470.

Had the United States set up a claim to this land as its own, and it had been held under that title, we concede that no local act of limitations could interfere with its supreme power of control. This has been fully recognized by the Supreme Court. 4 How., 169.

The United States made no claim. The claim of the defendant was recognized, because he had adduced proof of title. The United States withdrew all claim to the land, and simply reserved a power to survey it to ascertain its location. This statement of the case shows that the opinions of the State court upon the statute of limitations do not operate to deny a title held under the United States.

The remaining question upon the bill of exceptions, relating to the construction of the act of Congress, arises upon the admissibility of the Spanish title papers of the defendant.

The defendant, at the time (1814) the commissioner appointed under the act of 1812 (1 Clarke's Land Laws, 606) called for evidences of claim, had in his possession only the deed to himself from Orsono. This deed was exhibited, and *441] a fourteen *years' occupancy under it was established. The original grant, and the intermediate conveyances, were not produced. The confirmation of the United States was procured upon this statement of the title of the defendant.

It is a public fact, that, at the time the Spaniards left the country, many of the title papers were carried away. The archives were left in great confusion. In the State of Alabama no order was made respecting the Spanish records until

1821. The act of the General Assembly of that year indicates the disorder which prevailed. Toulmin's Digest, 699.

In the translation of the records, those papers which Eslava had supposed to be lost, were found. They show a connected title to Orsono, from whom Eslava claims. The question then arises, Has the act of Congress prohibited the use of these papers in the maintenance of his right? The object of the act was to compel the production of title-papers to the commissioner for the examination of claims. The failure to produce such muniments of title was visited by a prohibition against their introduction subsequently as evidence in the courts of the United States.

This section could not have been designed to apply to the case of a claimant whose claim was substantiated to the government, independently of a paper title, and whose claim had been afterwards recognized by the government. The object of the statute was to protect *bond fide* purchasers, or claimants under the government, who had no notice of the dormant Spanish titles. When the Spanish claimant had adduced his claim, supported it by competent evidence, and it had been confirmed, there was no motive for applying a penalty to him, and his case is clearly not within the purview of the statute.

This view of the statute, reasonable as it appears, was not adopted by the State court. The court allowed the Spanish documents of title as evidence of the claim of the defendant, and those under whom he derived title, and of the date of the claim. The admissibility of the evidence was confined in its operation to its effect in establishing a prescription under the statutes of limitation.

The same question arises here which has been discussed in another branch of this cause. Has the Supreme Court jurisdiction over the questions of evidence decided in this case? The act in question prescribes a rule of evidence for the courts of the United States.

Granting the act of Congress to be operative as enacting a barrier against the introduction of any title paper as evidence which has not been registered according to the act, does it *apply to a State court? Can Congress undertake to decide what evidence shall be admitted to support a [*442 plea of the statute of limitations in a State court? Can Congress undertake to determine what deeds shall be evidence of title in controversies similar to that now offered to the court? Congress has abandoned all claim to the land, and has conceded that both of the claimants have a superior right to theirs. Is it competent for Congress to dictate the form of evidence by which the title of these parties shall be

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established in the State courts? The language of the act requires the sanction of no such pretension on the part of the government.

We contend that, when Congress established the title of the defendant, as founded on a grant lost by time or accident, it could never afterwards have designed to contest, or to furnish its citizens with the means of contesting, the existence of their title. The objects set forth in the adjudications of the Supreme Court, as the landmarks of the national policy, forbid such a conclusion. Such a course would have produced confusion, embarrassment, and litigation, when the policy of the government was to promote peace, order, and security.

Mr. Coxe, for the plaintiff in error, in conclusion, made the following additional points.

1. That the patent from the United States to the plaintiff must prevail against defendant, who exhibits none.

2. That the report of the commissioners, January 1, 1823, being prior to the patent certificate of defendant, September 3, 1824, confers a prior title of confirmation by the United States.

3. That under said act of May 8, 1822, and other acts of Congress, the lines and boundaries established by the register and receiver, and embodied in the patent, are conclusive as to title as well as to boundary.

4. That, according to defendant's showing, the register and receiver never did authoritatively fix the lines of his lot, and the conveyance annexed to the warrant, and to which the surveyor refers in his plat of survey, had calls which could not be complied with without coming into conflict with other claims.

5. The petition, the foundation of defendant's title, calls for a lot 10 toises (60 feet) in breadth, 26 toises (156 feet) in length. The deed, purporting to be from Elizabeth Fonnerette, appears to be signed by Isabella Fonnerette, and this calls for 60 feet front, 126 feet deep. Francisco Fontanella, not Francis, the previous grantee, conveys to Orsono 114 feet in front and 126 feet in depth; and Orsono, in his conveyance to Eslava, without indicating boundaries, sells the lot which he had purchased from Don Francis Fontanella.

*443] *6. Elizabeth or Isabella Fonnerette's deed calls for John Joyce's lot as the northeastern boundary; and Dinsmore, the surveyor, in his return, says the front of 114 feet could not be found without interfering with Joyce's lot.

7. The original petition of Elizabeth Fonnerette recognizes the claim of Farmer as a prior one.

8. The return of the surveyor gives the lines as surveyed 226 feet by 112, adding one hundred feet to the call of Fontanella's deed.

9. The superficial contents, according to the petition, 10 toises (60 feet) by 26 (156), would be 9,360 square feet; according to Fonnerette's deed to Fontanella, 68 feet by 126, 7,560 square feet; by Fontanella's deed to De Orsono, 114 by 126, 14,364 square feet; by Dinsmore's survey, 226 by 112, 25,312; by the register of location, 7,200 square feet. These various documents of title are thus incongruous and inconsistent.

10. The deed from De Orsono to Eslava does not purport to convey the entire property which he had purchased from Fontanella, but uses this language as describing the property conveyed:—"the house pertaining to me, wherein I dwell, upon the lot of ground that I bought of Don Francis Fontanella, &c., I yield the right of action and ownership in the house I had and held."

11. It will be observed that the register says that Eslava's claim is allowed to the extent of 7,200 feet. By the fourth section of the act of May 8, 1822 (Land Laws, 349), it is provided, "that in all such claims where the quantity claimed is not ascertained, no one claim shall be confirmed for a quantity exceeding 7,200 square feet. It is contended that this is an adjudication by the register and receiver, that this was such a claim as was thus restricted as to quantity.

12. That therefore the court erred in refusing, as it appears was done, all the prayers for instructions on the part of plaintiff.

Mr. Justice WOODBURY delivered the opinion of the court.

This was a writ of error on a judgment rendered in the Supreme Court of Alabama.

Our jurisdiction to revise such a judgment is very strictly limited to cases where some right or title was set up by a party under the general government,—its constitution, treaties, or laws,—and was overruled. It is this Federal character of the claim decided against which furnishes some justification for a revision of a State judgment in a Federal court; and unless it be clearly of that character, the foundation as well as the policy for our interference entirely fails.

*So we are confined in our inquiries in a writ of error like this, under the twenty-fifth section, to what appears on the record in some way or other, not only to have been set up under the United States, but decided against by

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the court. *Montgomery v. Hernandez*, 12 Wheat., 129; *Crowell v. Randell*, 10 Pet., 392; *McKinney v. Carroll*, 12 Pet., 66; *Pollard's Heirs v. Kibbe*, 14 Pet., 353, 360; *Coons v. Gallaher*, 15 Pet., 18; 16 Pet., 281; 7 How., 743. It must, too, be overruled improperly; otherwise there is no grievance to be redressed.

As the plaintiff asserts, that such a right or title has in this case been overruled, and that improperly, the burden to show it devolves on him (*Garnett et al. v. Jenkins et al.*, 8 Pet., 86); and as the State tribunals are presumed to do their duty, we should not disturb their decisions, even on matters connected with the general government, unless very manifestly improper or erroneous. *Carroll v. Peake*, 1 Pet., 23; 13 Pet., 447; *United States v. Arredondo*, 6 Pet., 727; 12 Pet., 435, 436. From the record in this case, it appears that both parties claimed the land in controversy, by titles confirmed by the United States, as well as by long possession at different periods.

The possession by those under whom the plaintiff claims had continued from 1757 to 1787; while that of the defendant and his grantors had remained from the last date to the present time, with no interruption except by some legal proceedings between 1819 and 1826, which in the end terminated favorably to the defendant, and left him in the actual occupation of the premises.

The British power, under which Farmer was an officer, ceased a short time before Farmer's heirs left the country, in 1787, and the Spanish power ceased just before their return, in 1819, and for this or some other cause there seems to have been an entire abandonment of the country and of this lot by Farmer's heirs during that period of over thirty years; and a new license by the Spanish government was, therefore, soon given to those under whom Eslava claims, to enter upon it as a vacant lot; and an exclusive occupation and building on it, as if their own, followed by them and Eslava during the same period of thirty years, as well as most of the time since.

The principles of law applicable to these possessions, as existing in Alabama, and as to land held under ancient French and Spanish permits and grants, we do not propose to consider; nor to revise the correctness of the rulings of the State courts concerning them, because they are matters
 *445] clearly within their sole jurisdiction. But with the other branch of the case, so far as title was attempted to be proved by the plaintiff from or through the United States, and was decided against, the course should be other-

wise, and our jurisdiction must be good to ascertain whether the decision made was a correct one.

Under this consideration, it is doubtful in the outset whether the claim of the plaintiff ought not, on the evidence now produced, to be regarded as a perfect or complete title, derived from the French patent or grant of 1757, to Grondel, and not to be regarded as a title derived from the United States, and to be revised here if overruled in the State courts. Such a title is not to be affected or regulated by the political authorities to whom a country is afterwards ceded, any more or otherwise than any private rights and property of the inhabitants of such a country. *United States v. Arredondo*, 6 Pet., 691; *United States v. Percheman*, 7 Pet., 51, 97; *Mitchell et al v. United States*, 1 Pet., 734, 744; 12 Pet., 437, 438; 14 Pet., 349, 350.

And when a party, holding such complete title, is encroached upon, he should find protection in the judicial tribunals, as he can get nothing by a resort to confirmations, or releases, or patents by the political power which acquired the sovereignty over the territory, but not the property itself, "belonging to its inhabitants." Chief Justice Marshall says, in 7 Pet., 87, "The king cedes that only which belonged to him. Lands he had previously granted were not his to cede." And the complete title to them before obtained is strengthened by no confirmation from the United States, who have acquired no interest in them. *Garcia v. Lee*, 12 Pet., 519; 6 Pet., 724.

It is questionable, then, whether the confirmation and qualified patent sought and obtained in this instance from the United States conferred any title, or are to be deemed the true source of the title of the plaintiffs. In this view, it would be a title or right derived from France, and to overrule it is to overrule what is derived from France, and not the United States.

The language of the acts of Congress on this subject (4 Stat. at L., 700 and 708) seems decisive on this point; as by it the complete grants or titles are "merely recognized as valid," while the incomplete ones of a certain character are "confirmed." In the former, the title has already passed to the possessor before the cession, and no confirmation is needed nor rights required from the United States, they having nothing to grant, whether by a statute, or, as here, by a mere quitclaim patent.

The exceptions or defects in the chain of this title to Farmer *seem by the present proof to have been all overcome by entry, building, and legal presumptions; [*446

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though when before the local officers, both parties appear to have been very unsuccessful in collecting many of the facts and papers since obtained.

But if, as reported by the commissioners, this is to be treated as an incomplete and confirmed claim, the State court do not appear to have overruled the title set up by the plaintiff, so far as derived from the United States. They instructed the jury, as to "the title from the United States to either party," that "both were confirmed equally, and the confirmations balanced each other; and, to decide the controversy, the jury must look to the other evidences of title." They accordingly did so look; and as the defendant's grantors, after Farmer's death, and after his family left, entered under a license from the public authorities, given on the ground that the lot had been abandoned and was vacant; and as they and Eslava had occupied it since till 1819 undisturbed, and had been quieted in it again in 1826, and continued there till this time, the jury appears to have found they were not to be disturbed now by any possession or title of Farmer and his heirs before 1787.

Beside this general instruction concerning the confirmations of each title being of equal validity, the court refused to instruct the jury, though requested by the plaintiff, "that the paper title produced by" him "was better than the paper title of the defendant." This is likewise excepted to.

But neither of these instructions, whether the general or special one, seems to have overruled any title derived from the United States; which was merely a confirmation. On the contrary, they consider it as sustained, but the defendant's title thus gotten sustained also, as well as the plaintiff's. It is true, they do not regard the former as better than the latter, and in this view we see no manifest error.

The title of the plaintiff, so far as connected with the United States, consisted of a confirmation of the French grant, and a quitclaim patent. The title of the defendant thus connected consisted of a confirmation of a supposed Spanish concession, and a certificate of this fact, entitling him to a patent, if he wished. Both were confirmed at the same time by Congress. The former, then, is no better as to title than the latter. A patent like the subsequent one in this case, merely quitclaiming or releasing any right of the United States, gives no title to the patentee superior to what a confirmation had given. Thus, in *Grignon v. Astor*, 2 How., 344, the court remarks,—“It has been contended by the plaintiffs' counsel, that the sale in the present case is not valid, because

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Peter Grignon had not *such an estate in the premises as could be sold under the order of the County Court, [*447 it being only an equitable one before the patent issued in 1829; but the title became a legal one by its confirmation by the act of Congress of February, 1823, which was equivalent to a patent. It was a higher evidence of title, as it was the direct grant of the fee which had been in the United States by the government itself, whereas the patent was only the act of its ministerial officers." See also *Les Bois v. Bramell*, 4 How., 463; *Strother v. Lucas*, 12 Pet., 411; 8 Cranch, 244-249; and 1 How., 319, 324. After such a confirmation, no patent is necessary to confer a perfect legal title. *Sims v. Irvine*, 3 Dall., 456, 457. The case of *Bagnell v. Broderick*, 13 Pet., 436, relied on against this conclusion, does not militate against it, but merely holds that, a patent of the fee having once issued on a certificate of purchase, it is not permissible to go back of it, and to issue another on the same certificate. See also *Boardman et al. v. Read et al.*, 6 Pet., 342.

But it is well settled, that a prior claim, independent of any patent, may for some purposes be considered, and be, valid, and for other purposes may be considered as confirmed by the patent. *Carroll v. Safford*, 3 How., 461; 4 How., 462; *Brush v. Ware et al.*, 15 Pet., 106, 107; 7 Wheat., 149. A certificate of confirmation, such as Eslava had, is very different from a certificate of purchase, as the former shows that the legal title has already passed, while the latter is merely evidence that it ought to be passed. A patent is necessary to complete the legal title in the last case, but not in the first; though an equitable title for many purposes exists, even under a certificate of purchase, without a patent. 3 How., 400; 15 Pet., 93; 5 Cranch, 93; 13 Pet., 498. Again, as both of the titles here relate chiefly to the same land, the junior title might, but for other objections, be allowed under the act of 1836 to be located elsewhere, and then in some sense be deemed inferior. *Les Bois v. Bramell*, 4 How., 449, 464. But Eslava's claim covers more than that by Farmer's heirs. Besides this, it did not originate independent of Farmer's, but on the hypothesis that Farmer's had been abandoned and become vacant, and a title to the lot is set up also under long possession since, by Eslava and his grantors. The superior right is then to be settled under these facts, and not as if double patents had been issued for a title, existing at the same time to the same lot, and from like sources. There are no other questions raised on the record by the bill of exceptions, as to overruling the validity or superiority of

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*448] either title, in connection with the United States. *Though in the argument, on the side of the plaintiff, the title is contended to be superior, because commencing earlier, notwithstanding it is broken by an absent deed, and because certified earlier for confirmation. On the other side, the defendant's is insisted to possess a higher equity, because accompanied by a longer possession, an earlier survey, the erection of valuable buildings, and the claimant being both a Spaniard and resident when the country was ceded to the United States. But the State court does not appear to have given instructions on any of these particulars, or to have been specially requested to do it, and it is questionable whether the legal effect of any of them, if considered, would have been very material to the title, when both titles were treated by the government and the public officers, as imperfect grants, and both confirmed at the same time by the same act of Congress. All the right or title really obtained in either from the United States is a confirmation of a grant and permit made before the cession, and deemed by the local officers incomplete and imperfect. Yet, so far as derived or held under the United States, each title was of the same rank or dignity and duration with the other.

Some questions arose at the trial concerning the construction of deeds and other conveyances.

In both lines of title, buildings only are in some instances nominally conveyed, and not in terms the lots on which they were situated, in both, too, some of the boundaries are unsettled, and the quantity of land in dispute by the papers is viewed differently. But such questions as these are subordinate to the question of title, and proper for the consideration of the State court in exercising its appropriate jurisdiction over local questions, and hence not subject to our revision. 13 Pet., 439; *United States v. King*, 3 How., 773.

Various other objections connected with the paper title on both sides appear, and almost every year some new difficulty is started in respect to Spanish and French grants, which is perplexing, and which at times seems to bring into doubt parts of former decisions.

But the chief trouble in disposing of this class of cases is in ascertaining the facts, happening under a foreign government, and after such a long lapse of time, and especially when new papers and some new witnesses are frequently discovered; and the aspect of particular claims is often thus materially changed. Where, however, rights of property have been adjudged, and litigation in some degree quieted, it is much better to regard them as binding, than to disturb or

change them, and the actual possession, for slight or doubtful reasons.

*The errors in the law of a case, on the facts at any time presented, are not likely to be material, where the Civil Code is the basis of it under Spain and France, and when that and its enlightened equities are well understood, and, with the plain provisions in treaties and acts of Congress, will lead usually to correct conclusions.

Only one other source of title, set up under the United States, remains to be examined. It is a provision in the fifth section of the act of May 8th, 1822, giving to the registers and receivers in this part of Alabama "the same powers to direct the manner in which all lands confirmed by this act shall be located and surveyed, and also to decide between the parties in all conflicting and interfering claims, as given in" another act mentioned, 3 Statutes at Large, 700. It is contended that in 1837 they decided such claims, concerning titles between these parties, and decided them in favor of the plaintiff, and therefore that the State court should have instructed the jury that his title was the better one.

But we do not consider that the act of May 8th, 1822, and that of the same date which is connected with it and referred to as *in pari materia* for a guide (p. 708), meant to confer the adjudication of titles of land on registers and receivers (7 Pet., 94). Those officers are not usually lawyers, and their functions are in general ministerial rather than judicial.

Sometimes, as in the case of preëmptioners, they are authorized to decide on the fact of cultivation or not; and here, from the words used; no less than their character, they must be considered as empowered to decide on the true location of grants or confirmations, but not on the legal and often complicated question of title, involving also the whole interests of the parties, and yet allowing no appeal or revision elsewhere.

The power given to them, as before quoted, is to decide only how "the lands confirmed shall be located and surveyed" (p. 700). The further power "to decide on conflicting and interfering claims" should apply only to the location and survey of such claims, which are the subject-matter of their cognizance; and on resorting to the reference made to the second act of Congress, that act appears to relate also to decisions on intrusions upon possessions and kindred matters (p. 708).

The language concerning this is, if conflicts arise, these officers, in settling them, shall "be governed by such conditional lines or boundaries as may have been agreed on" before

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the act passed, &c. (p. 708). So far from professing themselves to act on titles, in cases of conflict, they usually take evidence or settle boundaries alone.

*450] The map from the surveyor's office in Alabama, of 22d April, 1837, confirms this. It is a mere location and survey of the different tracts; and the register of the warrant is entitled by them, "Register of Locations issued for Confirmed Claims," &c.

So, in cases of commissions to settle land claims, Congress seldom intrusts the final adjudication of titles to them, but requires them to report their opinions; and the titles are rejected or confirmed by Congress, as seems most proper under all the evidence on a revision of it. 7 Pet., 95; 12 Pet., 453.

The language changes in the acts of Congress when the local land officers are to act in any way on titles, and the expression is distinct, "titles and claims," as when asking them for evidence to be reported, as is sometimes done in respect to titles. See act of March 3d, 1827 (4 Stat. at L., 240). Or it is "titles to be referred to and confirmed by Congress" (1 Land Laws, 437). Or it is expressed that this decision shall not "be construed to prevent or bar the judicial decision between persons claiming titles to the lands confirmed." Under these considerations, we do not feel justified in changing the judgment rendered in the State court. Beside the cases already referred to in support of this conclusion, we would quote, as in several respects directly in point, *McDonogh v. Millaudon*, 3 How., 706, 707.

Judgment affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Alabama, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court in this cause be, and the same is hereby, affirmed, with costs.

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*JOHN DOE, EX DEM. OF CATHARINE LOUISA BARBARIE, ANN BILLUP BARDE, DANIEL R. BROWER [*451 AND ANN B. BROWER, HIS WIFE, CURTIS LEWIS AND ISABELLA LEWIS, HIS WIFE, JOHN T. LACKEY AND MARGARET LACKEY, HIS WIFE, HEIRS AND LEGAL REPRESENTATIVES OF ROBERT FARMER, DECEASED, v. THE MAYOR, ALDERMEN, AND COMMON COUNCIL OF THE CITY OF MOBILE, AND JOSEPH CLEMENTS.

Under the two acts of Congress passed on the 8th of May, 1822 (4 Stat. at Large, 700 and 708), the register and receiver of the land office were not empowered to settle conflicting titles but only conflicting locations.

In this case they did not describe a boundary line by visible objects, but called to bound upon another line.

The authority given to these officers was to be exercised only in cases of imperfect grants, confirmed by the act of Congress, and not cases of perfect title. In these they had no authority to act.

Hence, where a State court left the question of location to be settled by a jury, this court will not disturb the judgment of the State court founded upon such finding.

THIS case was brought up, from the Supreme Court of Alabama, by a writ of error, issued under the twenty-fifth section of the Judiciary Act.

It was a branch of the preceding case of the same plaintiff against Eslava. In the statement of that case, it is mentioned that the suit was brought against all the defendants conjointly, but that the city of Mobile obtained leave to sever in their plea. This case is the result of that severance.

The title of the plaintiff is set forth *in extenso* in the report of the preceding case, and need not be here repeated. The defendants produced no official survey or patent for the lot in question, but relied exclusively upon the act of Congress passed on the 26th of May, 1824 (4 Stat. at L., 66).

The bill of exceptions states all the points in which this case differs from the preceding one.

Bill of Exceptions.

| | | |
|--|---|------------|
| "Doe, ex dem. Farmer's Heirs, | } | Ejectment. |
| v. | | |
| Roe, Mayor and Aldermen of | | |
| the city of Mobile, and Joseph Clements, Tenant, &c. | | |

"Mobile Circuit Court.

"Be it remembered, that, on the trial of this cause, the plaintiff, to maintain the issue on his part, produced and

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read to the court and jury from the third volume of the American State Papers, title Public Lands, page 18, an *452] abstract of the *title to the lessors of the plaintiff, being claim No. 45, and which it is agreed may be read from the said book on the hearing of the cause in the Supreme Court of this State, or the United States, if it shall be carried thither. He likewise read to the court and jury the act of Congress passed the 8th day of May, 1822, confirming said claim. He further read to the court and jury a patent from the United States, issued in pursuance thereof, dated the 14th day of November, 1837, for the premises in question, granted to the heirs of the said Robert Farmer, in right of Philip Gonjon de Grondel, wherein the said premises are described as follows, to wit:—Beginning at a post on the line of the claim of William McVoy, at the distance of twenty-four feet north of the northeast angle of Government Street and Emanuel Street; running thence north sixty-nine degrees east (with the line of McVoy), eighty-nine feet seven inches to a stake, the southeast angle of a brick cotton-shed, bearing north seventeen degrees west, distant forty-two feet one inch; thence north seventeen degrees forty minutes west, two hundred and twenty-four feet, to the south boundary of the bakehouse lot; thence with said south boundary, south seventy-five degrees fifteen minutes west, eighty-nine feet six inches, to the east boundary of Emanuel Street; thence with said street, south seventeen degrees forty minutes east, two hundred and thirty-four feet, to the place of beginning; containing twenty thousand four hundred and ninety-five superficial feet English, and being a lot in the city of Mobile, and State of Alabama, in township four south of range one west, in the district of lands subject to sale at St. Stephen's, Alabama, a copy of which patent is hereto attached as a part of this record. The plaintiff proved the defendants in possession of the premises, the particular location thereof, the heirship of the lessors, &c. And it was further proved on the part of the plaintiff, that Robert Farmer was a British subject, a native of North America, and died in Mobile about the year 1780 or 1781, as appears from the deposition of Madame Beaumont hereto attached as a part of this record; that he was an officer of the British army at the time of his death; that the family, shortly after the conquest by Spain of that Province, removed from the Province, and none of them returned during the whole period of the Spanish supremacy. And that De Vobiscey, father of one of the lessors, came to Mobile in 1818 or 1819, to set up the claims of the family. The defendants, for the

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purpose of maintaining their issues, introduced the act of Congress of the 26th of May, 1824, entitled 'An act granting certain lots of ground to the corporation of the city of Mobile, and to certain *individuals of said city,' and claimed the lot in dispute as a portion of the bake- [*458 house lot specified in said act.

"The defendants produced no official survey nor patent from the land office for the lot, but relied on said act alone. To establish the boundaries of the said lot, they had the depositions of Catharine Walters, Thaddeus Sandford, and Nicholas Weeks, taken by commission issued and executed regularly, which said depositions are hereto attached as a part of this record. The plaintiff objected to the reading of the depositions, because the evidence was irrelevant, incompetent, and improper under the issue, and went to contradict, to vary, and to change the legal import and terms of the patent introduced by the plaintiff.

"The court overruled the objection, and suffered the depositions to be read, to which the plaintiff excepts. The defendants called a number of witnesses, and examined them as to the marks and memorials that existed of the bakehouse lot, as it was used and occupied in Spanish times, and as to those which remained after the departure of the Spanish government, (none of which appeared in the patent under which the plaintiffs claimed, either as landmarks or otherwise, nor are they now visible, nor did any of the witnesses swear that they were the lines of the lot aforesaid, nor was it proved who put them there, or when they were put there,) and proved the facts of the possession by the adjoining proprietors, Joaquin de Orsono and Miguel Eslava, in Spanish times; and that in 1824, when the lot was taken by the defendants, the mayor and aldermen of said city leased a portion to third persons, without objection by the plaintiff's lessors, or the heirs of Eslava, that the witnesses knew of (four of these witnesses were members of the corporation in 1824), both of whom claimed the lot south and bounding on the king's bakehouse, and that no suit had been brought before this suit for the same; that the witnesses knew of no written evidence of any suit that was before the jury; that improvements had been made on the lot by the defendants, on the line as now claimed by them.

"The object of all this testimony on the part of the defendants being to show that the king's bakehouse lot was as it is claimed to be by the defendants, and to show that the defendants are not in possession of any lands that did not form a portion of the said lot, and that the courses and distances laid

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down in the patent conflict with the right of defendants, which evidence was objected to by the plaintiff as irrelevant, improper, and incompetent, which exceptions were overruled by the court. The defendants, further to establish their southern boundary line, proved that the next lot was claimed by *454] Joaquin *de Orsono in Spanish times, and was used and improved by him; that he parted with his possession and title to Miguel Eslava, who was at the time commissary and storekeeper for the Spanish troops at Mobile, who was in possession when De Vobiscey came to the State, and who has been controverting the right of Farmer's heirs ever since, and that his heirs are now in possession of the said lot, and have been for more than twelve years. The defendants proved that their claim to the possession was not disputed by said Eslava or his heirs; further, the defendants produced the book of translated Spanish records, from the County Court of Mobile County, and offered to read a deed from Francis Fontanella to Joaquin de Orsono, on record in said book, for the lot south, calling for the bakehouse lot as the northern boundary, bearing date in 1801, and a copy of which is attached as part of this record. The plaintiff's counsel objected to this deed because the same was irrelevant, and incompetent, and because there was no evidence that the same had ever been offered to any commissioner appointed under the acts of Congress for the examination of private land claims, under the treaty between the United States and France. The court overruled the objections, and the deed was read to the jury, to which the plaintiff excepts. The French grant to Grondel, calling for the *boulangerie du roi* for its northern boundary, was before the jury, and read by defendant's counsel. There was no evidence that the claim to possession was ever disputed by Eslava or his heirs, but there was evidence that the corporation, shortly after they took possession of the lot (as testified by Josiah Wilkins, who was a member of the corporation at the time), procured the fence that bounded the bakehouse lot on the south to be moved in the night-time, some thirty or thirty-five feet south, upon the premises claimed by the plaintiff, while the said Vobiscey, one of the heirs of Farmer, was in possession thereof. This was the substance of all the evidence given, before the jury retired to consult on their verdict. The court read to the jury, as a part of its charge, a statement and opinion of the Supreme Court of the State of Alabama, in the same case, reversing the judgment heretofore rendered in this court in favor of the plaintiff, which statement and opinion is in these words and figures, (see the manuscript hereto appended, marked A,) and in-

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structed the jury, that the said statement and opinion were the correct and true law of the case, to which the plaintiff excepted. The court in its charge to the jury further instructed them, that the act of Congress of the 26th May, 1824, conferred upon the defendants as perfect and conclusive a title, and their claim and title to the *bakehouse lot [^{*455} was precisely equal in every respect under said act, as the plaintiff's title was under the patent on which he claimed, and was of equal dignity with the same. After the charge had been delivered by the court to the jury, and before they retired from the box, the plaintiff requested the court to instruct the jury, that the act of Congress of the 26th May, 1824, granted to the said defendants, the bakehouse lot as a mere donation lot, and that the register and receiver at St. Stephen's were authorized, under the act of Congress of the 8th May, 1822, and other acts of Congress, to direct the manner and mode of surveying and making the location and division between these parties; and having done so, no parol evidence is competent to set aside, to vary, or change the location so made under their direction and set forth in the patent; which instruction the court refused to give, and to which the plaintiff excepts. The plaintiff further requested the court to instruct the jury, that no survey, plat, or other description of the premises in question, can outweigh or supersede the survey set forth in the patent under which the plaintiff claims, unless it be shown by the defendants in a patent, or an instrument of evidence of equal grade and authority with a patent; which instruction the court refused to give, and to which the plaintiff by his attorney excepts. To all which charges and refusals to charge, the plaintiff by their counsel excepts, and prays that his exceptions may be sealed and made a part of the record, which is done accordingly.

"G. BRAGG. [SEAL.]"

The following is the extract from the opinion of the Supreme Court of Alabama, which was declared, in the above exception, to be the law of the case.

"MAYOR AND ALDERMEN OF MOBILE v. THE HEIRS OF FARMER.

"1. The power given to the registers and receivers, by the different acts of Congress, to determine between conflicting and interfering claims, and to direct the manner of locating and surveying them, applies only to confirmations of imperfect grants by the former proprietors of the country. These

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officers have, therefore, no power to locate and direct the survey of a disputed line, where one of the parties claims by virtue of a complete and unconditional grant, as in the case of the donation to the corporation of Mobile of the hospital and bakehouse lots by the act of the 26th May, 1824.

“Error to the Circuit Court of Mobile. Ejectment by the defendants in error against the plaintiffs in error.

“The plaintiff below, to sustain his case, introduced in *456] *evidence a patent from the United States to the lessors of the plaintiff, for certain lands in the city of Mobile, and proved that the premises sued for were within the lines of the patent.

“The plaintiff also read the deposition of James Magoffin, and certain proceedings of the land office at St. Stephen’s, in relation to the boundary of the lot known as the ‘bake-house lot,’ and other testimony proving the heirship of the parties, which need not be stated.

“The defendants relied on the act of Congress of the 26th May, 1824, entitled, ‘An act granting certain lots of ground to the corporation of the city of Mobile, and to certain individuals of said city’; and offered to prove that the lines of the bakehouse lot in the city of Mobile, at the date of the act, comprised the *locus in quo*. The plaintiff objected to this evidence, on the ground that the transcript of the record attached to the evidence of James Magoffin, in which the limits of the bakehouse had been ascertained by him, was conclusive. The court sustained the objection and excluded the evidence, and charged the jury that the heirs of Robert Farmer were entitled to the property described in their patent; that the corporation was entitled to the bakehouse lot; but that the decision of the officers of the land office at St. Stephen’s was conclusive of the question. To which the defendant excepted, and which he now assigns for error.

“*Campbell*, for the plaintiff in error.

“The title of the plaintiff in error arises under the act of 26th May, 1824, by which the bakehouse lot is vested in him. This act amounts to a complete grant, and any question arising upon it is a judicial, and not a political question. What lands are included in the grant is not a question for the land office, but the court. 6 Cranch, 128; 8 Id., 244, 249; 6 Pet., 741; 12 Id., 454; 14 Id., 414; 3 Dall., 456.

“The defendants’ title is inferior. The patent bears date in 1837; the terms of renunciation are *in presenti*, and no evidence of title prior to 1824 is presented.

"The register and receiver at St. Stephen's were not authorized to settle conflicting boundaries. Their power is exhausted by the settlement of the question of location for the purposes of the land office. Whether that location is accurate, so far as third persons who claim by grant previous to the act of location are involved, is a question which can only be settled by the parties themselves, or by courts of justice. Instructions and opinions of the land office, Part [] 1445, §§ 5, 6; 6 Pet., 735.

"*Phillips*, for the defendants in error.

"The title of the heirs of Farmer is derived from the act of *1822. Under that act, the certificate of the register and receiver was made and confirmed by Congress, and [*457 the plat of survey made the title. It is therefore older than that of the plaintiff in error, which commenced in 1824.

"The effort now is, to show that the north line, as fixed by the plat of survey confirmed by the act of 1822, was too far to the north. If, instead of being specifically located, the confirmed report had described it generally as the lot of Farmer's heirs, and in 1824 the donation to the plaintiff as the lot known in Spanish times as the 'king's bakehouse lot,' reserving the rights of others, under such circumstances, an inquiry ordered by the common grantor, and his decision thereon as to the boundary, ought to be conclusive, as a mere declaration of a fact which always existed; the more especially as the opposite party submitted to the jurisdiction, examined witnesses, and contested their rights.

"ORMOND, J. By the act of the 26th May, 1824, the United States granted to the mayor and aldermen of the city of Mobile 'all right and claim of the United States to the lots known as the hospital and bakehouse lots, containing about three fourths of an acre in the city of Mobile.' 1 Land Laws, 398.

"On the 14th of November, 1837, a patent issued from the General Land Office in favor of the heirs of Robert Farmer, upon a confirmation of a claim made by virtue of the act of the 8th May, 1822 (1 Land Laws, 352); which, among other designated boundaries, calls for the south boundary of the 'bakehouse lot' as one of the boundary lines of the land conveyed by the patent; and the controversy in this case is, What is the south boundary of the bakehouse lot? To establish this boundary, the plaintiffs rely upon a decision made by the register and receiver of St. Stephen's, which they insisted, and the court below held, to be conclusive of the fact.

"The right of these officers to determine this question is

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attempted to be derived from the various acts of Congress giving them power to determine between conflicting and interfering claims, and also to direct the manner of locating and surveying the lands the title to which had been confirmed. (See Land Laws, Part 1, 348, 352, and 455, and other acts, to which these are supplementary.) There can be no doubt that Congress may attach to a pure donation such terms as it pleases, and may invest the subordinate officers of the United States with power to determine questions of fact, and to ascertain and settle conflicting claims. Of this the different preëmption laws furnish examples. Whether it has such power in relation to the confirmation of imperfect titles derived from the former *proprietors of the country, is *458] a question which does not arise in this case.

“The power conferred on the registers and receivers to decide upon conflicting claims relates only to the confirmation of imperfect titles derived from the French, British, and Spanish governments; but the grant of the bakehouse lot to the corporation of Mobile was an unconditional donation of all right and title of the United States in and to the thing granted, which immediately passed to the grantee. The previous acts of Congress, therefore, giving to the receiver and register power to ascertain and settle the boundaries of conflicting confirmed claims have no application, and it was not competent for Congress to attach such a condition to it subsequently, and it has made no such attempt. The description of the thing granted in the act is sufficient to distinguish it from other lots in the city, and by the aid of extrinsic testimony its boundaries may be ascertained. *Blake v. Doherty*, 5 Wheat., 359.

“By the treaty, the United States acquired all the title of the crown of Spain to these lots as public property. The question then is, What was the boundary of these lots in Spanish times? This is a question of fact, and if a controversy should arise in relation thereto between the corporation and others claiming title to the adjoining lots, it can only be settled by those tribunals appointed by the constitution and laws for that purpose, unless the parties interested should voluntarily submit to some other mode.

“We are relieved in this case from the necessity of considering whether the recital in the patent of Farmer’s heirs of the boundary line would be conclusive, because the patent does not profess to locate the north boundary line other than by calling for the ‘south boundary of the bakehouse lot.’ The precise location must therefore be ascertained by testimony, showing where the south line was when in the occu-

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pancy of the crown of Spain. Such as its limits then were, it passed by the treaty to the United States, and with those limits it was granted to the corporation.

"It results from this examination that the court erred in determining that the decision of the register was evidence of the boundary line of the bakehouse lot, and its judgment is therefore reversed, and the cause remanded."

The above was the extract from the opinion of the Supreme Court of Alabama, which was given in charge to the jury by the Circuit Court of Mobile County. Under these instructions, the jury found a verdict for the defendant. The case was then *carried to the Supreme Court of Alabama, [*459 upon a bill of exceptions above recited, and that court affirmed the judgment of the Circuit Court.

The plaintiff sued out a writ of error, and brought the case to this court.

It was argued by *Mr. Phillips* and *Mr. Coxe*, for the plaintiff in error, and *Mr. Campbell* and *Mr. Sergeant*, for the defendants in error.

Mr. Phillips, for the plaintiff in error, made the following points:—

The title of the plaintiff, originating in the French patent to Grondel, was presented by the heirs of Robert Farmer, who claimed to hold under it, to the board of commissioners, and appears in the report of 1816 without any proof of inhabitation or cultivation. (3 State Papers, 32.)

This claim is renewed, and appears again in the report of 1820, in the register of claims to lots in the town of Mobile (Vol. III., p. 398, No. 27), when the proof of inhabitation and cultivation seems to have been made.

By the act of 1822, Congress confirmed this claim, reserving to the tribunal organized for that purpose the right "to direct the manner in which all lands confirmed by this act shall be located and surveyed, and to decide between the parties in all conflicting and interfering claims." (Act of 1822, § 5.)

The patent which issued upon this claim on the 14th of November, 1837, recites the deposit in the land office of the certificate of the register and receiver, with a plat of survey, under the provisions of the act of 1822, in favor of the heirs of Farmer, in right of Phillip Gonjon de Grondel, being No. 27 in abstract No. 7.

The king's bakehouse lot (*boulangerie du roi*) had been

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occupied by the Spanish authorities, under what title does not appear, and upon the change of government was regarded as public or unappropriated land.

Congress, by the act of 1824, without asserting any title to the lot, by the most cautious terms vested in the mayor, &c., "all their right and claim to the lot known as the bakehouse lot, containing about three fourths of an acre of land."

Language could scarcely be more guarded; yet they further expressly provide in the second section, "that nothing in this act contained shall be construed to affect the claim, if any such there be, or any individual, or any body politic or corporate." (See Act of 1824, 1 Land Laws, p. 885.)

*460] *If Congress, therefore, confirmed the plaintiff in his claim by virtue of the act of 1822, and reserved in the same act the right to determine its precise admeasurement by a survey thereof, it cannot be intended that two years afterwards it voluntarily donated the same lot of land to another. *United States v. Arredondo*, 6 Pet., 739.

The case presented is one where the common grantor has made two grants, and conclusively defined the limits of one of them.

The survey made by the government, and upon which the patent issued, is a complete one, all the lines being ascertained and closed, and it is not true, as the Supreme Court of Alabama has erroneously supposed, that one of the lines called for "is the south boundary of the king's bakehouse," on the understanding that this was a well-ascertained line.

The description of the premises in the patent refers to an actual survey upon the ground, made by the United States surveyor under the act of Congress, and which was duly deposited in the General Land Office. The courses and distances and the length of each line are accurately given, and the lot is declared to contain "20,495 superficial feet."

It is urged by defendants, that, as the line running north is described as "224 feet, to the south boundary of the bakehouse lot," the course and distance must yield to the line called for.

The general rule is admitted to be "that the most material and certain calls shall control those which are less material and less certain"; and that therefore "artificial or natural boundaries control course and distance." *Barclay v. Howell's Lessee*, 6 Pet., 499. See cases collected, 1 Met. & Perkin's Dig., § 20, p. 474.

But this rule as to artificial and natural boundaries is not an inflexible one; but when no mistake could possibly occur in the "course and distance," the reason of the rule failing,

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the rule falls with it. *Davis v. Rainsford*, 17 Mass., 207; *Fulwood v. Graham*, 1 Rich. (S. C.), 491.

There is no fixed line to the bakehouse lot which would raise such a case of contradiction to the "course and distance" as to raise the question of preference. Neither under the Spanish or American governments had the lot been surveyed, nor is there any evidence that it had ever been inclosed, or that the community had in any way ever recognized the location of its southern boundary.

This government was the absolute owner, as successor to Spain, of this lot, and held the legal title (as may be conceded *for this argument) to the adjoining lot of Farmer. Having confirmed the title of Farmer's heirs in [461 1822, and by its subsequent patent described the precise extent of its confirmation, it certainly could not have intended, by a pure donation in 1824, to grant to another a portion of these very premises.

Where a vendor holds two tracts adjoining, and sells a certain quantity by metes and bounds, though the deed call for one tract, the purchaser shall hold according to the metes and bounds. *Wallace v. Maxwell*, 1 J. J. Marsh. (Ky.), 447; *Mundell v. Perry*, 2 Gill & J. (Md.), 206.

In this case, the survey having been made by act of Congress to constitute the foundation of a patent, and adopted by the government for this purpose, the extent of the grant must be determined by the actual location upon the ground. *Machias v. Whitney*, 4 Shep. (Me.), 343; *Lewen v. Smith*, 7 Port. (Ala.), 428.

The construction of these boundaries was a question of law for the court, and not of fact for the jury. *Doe v. Paine*, 4 Hawks (N. C.), 64; *Cockrell v. McQuin*, 4 Mon. (Ky.), 63; *Hurley v. Morgan*, 1 Dev. & B. (N. C.), 425.

Mr. Campbell, for the defendants in error, made the following points.

The lessors of the plaintiff claim, that a parcel of land in the possession of the defendants is contained within the limits of a lot surveyed and patented to them by the United States. Two questions arise on the record:—

1. What is the construction of the patent, from the United States to the lessors of the plaintiff?

2. What is the effect to be given to that patent, as compared with the act of Congress of May 26, 1824, under which the defendants claim the lot?

1. The line which affords the subject of dispute is found in the patent as follows:—"From a stake, thence north 17° 40'

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west, 224 feet, to the south boundary of the bakehouse lot; thence with said south boundary, south 75° 15' west, 89 feet 6 inches, to the east boundary of Emanuel Street."

The plaintiff contends that these lines are to be ascertained from the courses and distances specified in the patent, and that the south boundary of the bakehouse lot is to be sought and established from those data. We contend that the south boundary of the bakehouse lot is regarded in this patent as a fixed and well-known line, and that there was no intention on the part of the government to interfere with it. The controlling call in the patent is the boundary of the bakehouse lot, and not the course or distances returned by the surveyor.

*462] *The line of a tract of land may as well be the subject of a call as a natural object. *Carroll v. Norwood*, 5 Har. & J. (Md.), 163; 1 Tayl. (N. C.), 163. It is as certain as a tree. *Pennington v. Bordley*, 4 Har. & J. (Md.), 457.

Where land is described as running a certain distance by measurement to an ascertained line, though without a visible boundary, such line will control the admeasurement and determine the extent of the grant. 6 Ala., 738; 8 Ala., 279; *Flagg v. Thurston*, 13 Pick. (Mass.), 145; 5 Har. & J. (Md.), 163; 13 Wend. (N. Y.), 300.

When the lines or courses of an adjoining patent, being sufficiently established, are called for in a patent or deed, the lines shall be extended to them without regard to distance *Cherry v. Slade*, 3 Murph. (N. C.), 82.

When a patent calls for the lines of another patent, it must stop at the first intersection with the latter. *Miller v. White*, 1 Tayl. (N. C.), 309; 16 Ohio, 428; *Gilchrist v. McLochlin*, 7 Ired. (N. C.), 310.

Grants of adjoining land by the State, and occupation under them, and subsequent conveyances, referring to monuments not existing at the time of the original grants, are admissible in evidence for the same purpose. *Owen v. Bartholomew*, 9 Pick. (Mass.), 520.

In locating lands the following rules are resorted to, and generally in the order stated:—1st. Natural boundaries; 2d. Artificial marks; 3d. Adjacent boundaries; 4th. Course and distance. *Fulwood v. Graham*, 1 Richardson, 491; 3 Gill & J. (Md.), 142–150.

The decisions of the Supreme Court, in so far as they bear upon this subject, are in coincidence with them. 6 Wheat., 582; 7 Wheat., 7; 6 Pet., 498; 3 Pet., 96.

We contend that the United States, having made an absolute grant to the defendants of the bakehouse lot, all questions relative to the extent and boundaries of that lot were

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placed beyond the control of the land office. The government may grant lands twice. The effect of such grants must be determined, not by the officers of the land office, but the parties claiming under them may assert their rights in courts of justice, and claim their judgments upon them.

The boundaries of the bakehouse lot were ascertainable by the party to the grant. If they assumed to control lands without the proper boundaries, their grant did not protect them. What land was included within the bakehouse lot was a question for a jury whenever a controversy arose concerning them, which became the subject of a suit in court.

*The officers of the land office could not inquire whether the defendants were intruders or otherwise. [*463 *Fletcher v. Peck*, 6 Cranch, 87; 8 Cranch, 244; 6 Pet., 741; 12 Pet., 454; 14 Pet., 414; 2 How., 319; 7 How., 586.

Mr. Sergeant, for the defendants in error, made the following points.

1. That there is no error in the judgment of the Supreme Court of Alabama.

For this general position, the points and authorities of the defendants' counsel below, and the Supreme Court of Alabama, are here adopted, and submitted to the court as sound and correct.

2. That there is no question in the case cognizable by this honorable court.

It is true that both parties claimed under acts of Congress, and that the plaintiff claimed under a patent from the United States, and alleged that he had a right which derived from the exercise of a United States authority. But it is also true, that, in point of law, neither of these claims was necessarily or at all involved in the case, or in its decision.

The plaintiff's patent calls for the "south boundary of the bakehouse lot" as its boundary on the north, and "thence with said south boundary"; so that one line was common to both lots, and was the boundary line between them. Neither could pass beyond it. There was, therefore, no interference between them. If either of them claimed beyond it, it must be under some other right. It could not be under the right derived from the United States, being inconsistent with its express terms, and contradictory to them.

This line was an established and existing line, as the line of the bakehouse lot, before any of the grants. It is recognized by the act of 6th May, 1824, which grants the "bakehouse lot" as a known and defined thing. The plaintiff's patent recognizes it as a fixed and established line. It is also

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recognized in the plaintiff's original French grant, dated in 1757. This lot, thus known and recognized, was granted by the United States to the city of Mobile in 1824. All grants afterwards made are of course subject to it. Besides, the patent of the plaintiff is only a release, and that release expressly subject to prior claims. The certificate of the register and receiver, too, expressly recognizes the south boundary of the bakehouse lot as an existing known boundary.

The question, then, is a mere question of fact, namely, Where was and is the south boundary of the bakehouse lot?

*464] *If it should be alleged that this question was before the register and receiver, and decided by them under an authority derived from the United States, there are several answers:—

1. That the question was never submitted to them.
2. That they never assumed jurisdiction of any such question, nor pretended to decide it.
3. That there was no subsisting case upon which they had any authority to act.

The case, therefore, was a mere question of boundary. That was a question for the jury, and the jury have decided it. *Kennedy's Executors v. Hunt*, 7 How., 586, 593; *McDonogh v. Millaudon*, 8 How., 693; *Mackay v. Dillon*, 4 How., 447.

Mr. Coxe, for the plaintiffs in error, made the following points.

The case depends upon the true construction of the act of 26th May, 1824. This is to be gathered from the language of the statute and the construction given to it by this court. 1 Land Laws, 398. The first section grants all the right and claim of the United States to the lots known as the hospital and bakehouse lots, containing about three fourths of an acre of land, &c.; also, the right and claim of the United States to all the lots not sold or confirmed to individuals either by this or any former act, and to which no equitable title exists in favor of any individual under this or any other act, &c., to the city of Mobile. The second section grants the right of the United States in certain lots whereon improvements have been made.

Upon this statute the defendant rests his entire claim.

The plaintiff's claim is founded upon a title originating under the former government, which had been submitted to the commissioners authorized to examine it, and confirmed by the act of May 8, 1822, (1 Land Laws, 348,) and finally evidenced by the patent, 14th November, 1837.

A comparison of these acts can leave little doubt upon this

question. In the act of 1822, certain titles derived from French, British, and Spanish authorities are in terms confirmed. These titles had originated in the public acts of the functionaries of these governments; they in granting, and the individuals in accepting them, had acted in good faith, believing, without any thing to awaken doubt, that the existing governments possessed perfect titles. Such titles, therefore, commended themselves to the justice, equity, and honor of the nation, and these claims had been recognized and confirmed by repeated acts of legislation. 14 Pet., 365, 377, &c. In the arrangement made *with Georgia, they had been [*465 to a certain extent secured, and Congress, in carrying out the provisions of that arrangement, had even exceeded in liberality the obligation which it had assumed. While, therefore, these inchoate or imperfect titles were confirmed, the limitation was imposed that they were to be regarded as confirmations, not new grants.

The fifth section contains a most important provision. It enacts that the registers and receivers of the land offices shall have the same powers to direct the manner in which all lands confirmed by this act shall be located and surveyed, and also to decide between all conflicting and interfering claims, as are given by another act passed the same day, although it appears later in the statute book. 3 Stat. at L., 707, c. 128; 1 Land Laws, 352, c. 273; see also § 4.

It will be observed, that the words of confirmation are in the present tense; but that the precise location of the land the title to which is confirmed is subsequently to be made by the officers of the government. When thus made, the particular bounds must be carried back to the date of the confirming act. It must also be remembered, that, so far as regards this case, the only party with whom any conflict could arise as to the boundaries of the land was the United States, under whom, by a subsequent act, defendants claim title. The authority of Congress, therefore, to prescribe the officers whose decision was to fix the lines and extent of these confirmations, while sufficiently clear as to individuals holding conflicting claims, is beyond all possible doubt as regards the government itself. The patent shows that this authority was exercised, and the United States admit it to have been properly exercised.

In this view of the case, then, it would seem clear that, under and by virtue of the act of 1822, the plaintiffs were presently confirmed, as against the United States, to the property claimed by them, to the full extent of the lines subsequently to be ascertained by the register and receiver, and included

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in their patent; and that this title, thus defined, could not be questioned or controverted by any party subsequently deriving title from the United States. This is the first proposition maintained on behalf of the plaintiff in error.

If this proposition needs corroboration, it is apprehended it will be found in the language of the act of 26th May, 1824, two years subsequently.

1. At that date, what title had the United States to the premises in question, which could be granted?

2. What do the United States profess to grant?

It has already been shown, that two years before this period
 *466] *Congress had, in the most solemn and precise manner, confirmed the plaintiff's title, and had intrusted to the officers of the government the power to locate the land and establish its boundaries, so far as either the government itself, or individuals claiming under a similar title, were concerned. The patent contains the most conclusive evidence that these officers executed the authority thus delegated, and that it received the sanction of the government.

Under this state of circumstances, Congress passed the act of May 26, 1824. (1 Land Laws, 398.) It grants to the city of Mobile the right and claim of the United States to two certain lots by name, estimated to contain about three fourths of an acre, but without any designation of the boundaries or extent of either. No official survey or location of these lots has ever been made; no boundaries have ever been officially ascertained; no action of any public functionary has been produced; no action by the land office has been had; no patent has been issued. Independently of the guarded language employed in the first section, and which, it may be argued, extends only to the general grant of "all the lots" there mentioned, the second section contains a district proviso, "that nothing in this act contained shall be construed to affect the claim or claims, if any such there be, of any individual or individuals, or of any body politic or corporate."

In *Lessee of Pollard's Heirs v. Kibbe*, 14 Pet., 361, this court says, in speaking of this act of 1824, "It being a private act for the benefit of the city of Mobile and certain individuals, it is fair to presume it was passed with reference to the particular claims of such individuals, and the situation of the land embraced within the law at the time it was passed." "If the second section applies to the lot in question at all, it is excepted out of the first section." (p. 362.) "It is not to be presumed that Congress would grant, or even simply release, the right of the United States to land confessedly before

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granted; this would be only holding out inducements to litigation." (p. 366.)

This case seems, then, definitively to settle these points:— that the grant to Mobile was a mere donation by the United States of its right and title, whatever that might be, to the city of Mobile; that it operates no injury whatever to any claim or title, whether those comprehended in the second section, or, still more obviously, such as had been previously recognized and confirmed; and that no construction ought to be given to the act which would make it enure in any way to the detriment of any other claim of any individual.

The city of Mobile, the recipient of this bounty, now *assumes, under color of this statute, a higher position [*467 than the United States have ever assumed in regard to this property; arrogates the right to fix, according to her own will, the extent of the property gratuitously bestowed upon her, when her pretensions come in conflict with grants, the equity, at least, of which the United States have ever recognized; disclaims the authority reposed in intelligent public officers, to whom the government had previously delegated the authority to decide upon the extent of the confirmations it had made; and repudiates the action of the Land Office and the patent emanating from the President.

Mr. Justice WOODBURY delivered the opinion of the court.

The original action in this case was ejectment for part of a lot of land situated in the city of Mobile.

The plaintiff contended, that the piece in controversy belonged to the tract which he claimed in the preceding case against Eslava, and to which he had the evidence of title shown there under a French grant in 1757, confirmed by an act of Congress of May 8, 1822, and a quitclaim patent for it issuing November 14, 1837. On the contrary, the city contended, that this piece belonged to what was termed the bakehouse lot, and into which it entered in 1824, under a grant from the United States by an act of Congress at that time, conveying all their title to it (4 Stat. at L., 67); and that this bakehouse lot, having been known by that name for near a century, and used by the Spanish authorities for baking bread for their troops, was a public lot at the period of the cession of the country in 1819, and hence passed to the United States, and a complete title to it was made from them to the city by the grant before named. Since the trial in the State court, we have, in the preceding case of *Farmer's Heirs v. Eslava*, so held as to show that those heirs are not entitled to

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any portion of the lot which is here in controversy, and have thus rendered a decision in this case not very important, except as regards costs.

But as the judgment there is not between the same parties as here, it may not in point of law settle this case, and we must therefore dispose of it on its own facts and merits.

For the purpose of the trial in the State court, whose judgment this writ of error is brought to reverse, it seemed in the end to be conceded that the plaintiff might have a just claim, so far as respects the city, to the extent of the true boundaries of the lot confirmed to him, and that the defendants might have a like claim to all which really was embraced in the bakehouse lot. But the plaintiff maintained that the southern *468] boundary of this last lot did not extend so far south as the defendants contended. And if it should extend in that direction no further than the plaintiff insists, the piece of land in controversy here would clearly belong to him.

Looking at the case first in this aspect, the trial in the State court was ultimately only a trial of the true boundary of the south side of the bakehouse lot; and any instructions by the court which are there excepted to on the evidence, whether parol proof could control written, or monuments restrain distances, &c., would not be revisable here under the twenty-fifth section of the Judiciary Act. They would depend on common law principles, or the peculiar laws of the State, and not on any acts of Congress, or doings of our public officers.

But the plaintiff insisted, that, when a conflict began concerning this line and the title to this piece of land, the register and receiver heard the parties, and being by the two acts of Congress of May 8, 1822 (4 Stat. at L., 700, 708), authorized to decide on such claims, they settled finally, then and for ever, both the title and location, including the true southern boundary of the bakehouse lot.

The State court does not seem to have concurred in this view, but allowed the parties before them and the jury to examine into the true line of the bakehouse lot on general principles; and it was settled against the plaintiff, so as to cover by that lot what the defendants occupied. This course by the court certainly overruled the right set up under the supposed decision of those public officers of the United States concerning the title, and hence, so far as regards that ruling, the judgment is subject to our revision.

In Eslava's case, however we have just decided that those public officers were not empowered to settle conflicting titles, but only conflicting locations; and if they made a location

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here of the lot claimed by Farmer's heirs, so as to embrace this strip or piece of land, which is not improbable, it would leave the title unsettled, and not thus vested in the plaintiff. Or if they went further and had a right to go further, and decided that the title in this piece was in Farmer's heirs, we think it by no means certain that the description in the patent, which is the whole evidence in the record before us as to their decision, would show this result with such clearness as to justify following it.

The northern line of Farmer's lot is still in their survey described as "the south boundary of the bakehouse lot." To be sure, if from the preceding corner you go, as directed, 224 feet, this strip would be included in Farmer's lot. But this *distance, if overreaching the true south boundary of the bakehouse lot, must yield to that as a monument, [*469 as was the instruction of the court, and as the jury have found in this instance it did. *Preston v. Bowmar*, 6 Wheat., 582; 6 Pet., 449; 7 Id., 219; 13 Pick. (Mass.), 145; 13 Wend. (N. Y.), 300.

Had this line on the north been described by the local officers, not only by saying it bordered on the south boundary of the bakehouse lot, but by specifying where that boundary was, by stakes and stones, or trees, or some other monument, the legal difficulty and doubt might have been overcome, in fixing with sufficient certainty, that they intended to indicate the exact place of that line, and that it was where the plaintiff contends.

But they did not do so, and beside these objections to their want of power to settle finally the conflicting claims as to title in any case as specified in *Barbarie et al. v. Eslava et al.*, it is very obvious that it was not meant to be extended to any conflict growing out of a title like that of the defendants. From the nature of the subject-matter and language of the acts of Congress, their authority embraced only those conflicts arising in cases of imperfect grants made before the cession of the country, and not a perfect grant like this to Mobile, from the United States alone, made since the cession.

The words of the first act give power to those officers to decide, even on locations, only as to "all lands confirmed by this act" (§ 5, ch. 122). But the bakehouse grant was not one of those "confirmed" by that act, and was not granted to the defendants till near two years after.

The fourth section of the other law (ch. 128), which is also to regulate their powers as to the location and survey of conflicting claims, specially excepts cases of perfect title, and includes only such as are "confirmed," &c., manifestly not

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embracing subsequent grants, like those of the United States to Mobile, never confirmed by commissioners, and hence to be adjudicated on, when in controversy, only by the proper judicial tribunals. 14 Pet., 414; 6 Pet., 741.

Such a title, too, is one of the highest character, and one which Congress by legislative grant, when owning the soil, is fully competent to give; and which needs not the aid of any patent. 6 Cranch, 128; *Strother v. Lucas*, 12 Pet., 454; *United States v. King*, 3 How., 773; *United States v. Gratiot*, 14 Pet., 529.

Hence the State court acted properly in considering the question of title still open, and balanced by the evidence, except as to the place of the true boundary on the south side *470] of the *bakehouse lot. That boundary it tried, and it was triable without any appeal to us.

It is not for us to interfere with its rulings or opinions on points belonging to the cognizance of State tribunals, though on the main controversy it might not be very difficult to decide, whether it erred or not, considering that the original patent in 1757 of Farmer's claim was on one side to be "of the depth which remains of the establishment of the king's bakehouse"; that the next conveyance by the patentee to Guichandene, in the same year, uses like words for that boundary, being "with the depth which remains after that of the king's bakehouse," and that this boundary is similarly described in all the subsequent conveyances; and considering that the bakehouse lot should therefore be first satisfied, and distances in deeds or patents yield to monuments; and considering that the line adopted was by much evidence shown to be the ancient line on that side by the ancient fence, and thus, too, giving to it a uniform instead of irregular shape, and not taking from it, as this claim does, near one third of its supposed size.

Finally, on what is properly before us under the twenty-fifth section, we think that the defendants, as grantees from Congress of the "hospital and bakehouse lots," (Act of 26th May, 1824, in 4 Stat. at L., 67,) should not be disturbed in their occupation of the latter lot, with the limits settled to be the true ones in the State court.

Judgment affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Alabama, and was argued by counsel. On consideration whereof, it is now

here ordered and adjudged by this court, that the judgment of the said Supreme Court in this cause be, and the same is hereby, affirmed, with costs.

*JOHN GOODTITLE, EX DEM. JOHN POLLARD, WILLIAM POLLARD, JOHN FOWLER AND HARRIET, [*471 HIS WIFE, LATE HARRIET POLLARD, HENRY P. ENSIGN AND PHEBE, HIS WIFE, LATE PHEBE POLLARD, GEORGE HUGGINS AND LOUISA, HIS WIFE, LATE LOUISA POLLARD, JOSEPH CASE AND ELIZA, HIS WIFE, LATE ELIZA POLLARD, HEIRS AND LEGAL REPRESENTATIVES OF WILLIAM POLLARD DECEASED, PLAINTIFF IN ERROR, v. GAIVS KIBBE.

The decision of this court in *Pollard v. Hagan*, 3 How., 212, reëxamined and affirmed.

By the admission of the State of Alabama into the Union, that State became invested with the sovereignty and dominion over the shores of navigable rivers between high and low water mark. Consequently, after such admission, Congress could make no grant of land thus situated.¹

THIS case was brought up from the Supreme Court of Alabama, by a writ of error issued under the twenty-fifth section of the Judiciary Act.

It involved the same principle decided by this court in the case of *Pollard v. Hagan*, reported in 3 How., 212. It is not necessary, therefore, to set forth the facts and title any further than they are stated in the bill of exceptions which was taken to the opinion of the Circuit Court for Mobile County. The action of ejectment was brought by the lessee of Pollard's heirs in 1838, and was tried in 1845.

Bill of Exceptions.

On the trial of this cause the plaintiff produced the following grant:—

“To the Commandant.

“William Pollard, an inhabitant of this district, states to you with all respect, that whereas he has a mill situate on his place of abode, and frequently comes to this place with

¹ FOLLOWED. *Doe d. Hallett v. Beebe et al.*, 12 How., 26. CITED. *Barney v. City of Keokuk*, 4 Otto, 338.

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planks and property from his mill, therefore he wishes to have a situation favorable to the landing and safety thereof, and there being a vacant piece of ground at the edge of the water, between the canal called John Forbes's and the wharf of this place, he prays you to grant him said piece of ground at the edge of the water, the better to facilitate his business. A favor which he hopes to obtain from you.

"WILLIAM POLLARD.

"MOBILE, *December 11th*, 1809.

"MOBILE, *December 12th*, 1809.

"I grant to the petitioner the piece of ground which he asks for at the edge of the water, if it be vacant.

"CAYETANO PEREZ."

*472] *The plaintiff next read the act of Congress, passed 26th May, 1824, entitled "An act granting certain lots of ground to the corporation of the city of Mobile, and to certain individuals in said city," and an act of Congress of 2d July, 1836, entitled "An act for the relief of William Pollard's heirs," and a patent of the United States in pursuance of the said act, for the lot in controversy, to the lessors of the plaintiff; the plaintiff further proved, that, in the year 1813 or 1814, some wreck and drift wood was removed from the place where the premises in question now are, by the hands of William Pollard, the grantee.

It was proved that in the year 1823, no one being then in possession, and the same being under water, Curtis Lewis, without any title, took possession of and filled up east of Water Street, and from it eighty feet east, and to the north of Government Street; that Lewis remained in possession about nine months, when he was ousted in the night by James Inerarity, one of the firm of Panton, Leslie, & Co., and of John Forbes & Co., its successor, claiming the land under the Spanish grant hereto attached, who improved the lot by the erection of a smith's shop. That shortly afterwards, Curtis Lewis recovered the possession under a forcible entry and detainer proceeding, and remained in possession for several years, during which he and Forbes & Co. were engaged in a lawsuit.

The whole matter was terminated by the purchase, in 1829, by Henry Hitchcock, of the title of Forbes & Co., of Curtis Lewis, and of the Mayor and Aldermen of Mobile. Henry Hitchcock remained in the possession of the property till 1835, when he sold to the defendant for \$28,000.

The defendant produced the original Spanish grant and

the English copy thereof, for the premises in dispute, with the certificate of confirmation, and produced the conveyances aforesaid, showing the title under which he claims.

He proved that Panton, Leslie, & Co., and Forbes & Co., have had possession of the lot specified in their grant from its date; that they fulfilled the conditions which are specified therein; that to the east of the present site of Water Street, they had a canal extending into the river, through which their boats came up; that there was an embankment on both sides of this canal, on which their goods were landed, and from which their shipments were made. The fillings up done by Lewis were done by sinking flat-boats in this canal.

The particular lots now sued for lie south of the canal and embankment aforesaid, and are between the king's old wharf and Forbes's canal; they lie to the east of Water Street, and fall within the lines laid down in the patent.

*The particular land in this writ was never improved until Cutis Lewis made the fillings up. It was further [*473 in proof, that previous to 1819, then, and until filled up, the lots claimed by plaintiff were at ordinary high tides covered with water, and mainly so at all stages of water; that the ordinary high tide at that time, flowing from the east, reached to about the middle of what is now Water Street. That in the Spanish times the eastern part of the lots to the west of Water Street was subject to be covered by water at ordinary tides by a flow of water from the river. That what is Water Street at this time was a natural ridge, which was not usually overflowed except at high tides; but there was a depression to the north of the lot of defendant, across which it flowed around upon the eastern part of the lots lying to the west of the lots sued-for. This ridge was about fifteen feet wide; Water Street was laid out in 1820, and is sixty feet.

That no one had possession of the premises in question before 1826, except as before stated. The lines of the lot in the Spanish grant, being extended to the river, include the premises in dispute.

It was further in evidence that Mr. Pollard died in 1816.

TEST & PHILLIPS, *for Plaintiff.*

J. A. CAMPBELL,

STEWART & EASTON, *for Defendant.*

And upon this evidence the court gave the following instructions to the jury, to wit:—

“Plaintiff claims under a Spanish grant by Cayetano Perez, of date December 12, 1809, act of Congress confirming the

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same, July 2d, 1836, and a patent from the United States in pursuance thereof, dated March 15th, 1837.

"Defendant insists that plaintiff's title is not good, because the Spanish grant of itself is incomplete and invalid, and although it was confirmed by act of Congress in 1836, yet, the premises sued for being the shore of a navigable river, lying below high-water mark at the time the State of Alabama was admitted into the Union, Congress, at the time of the act of confirmation, had no control over the subject, and was powerless to add any thing or impart any vitality to the Spanish grant.

"The plaintiff replies and says, that, by the treaty of 1819 with Spain, Spanish grants of the character of that under which the plaintiff claims were recognized by the United States, who assumed the obligation that said grants should be satisfied and confirmed. This obligation the plaintiff contends is to be *considered as a contract with the persons *474] holding these grants; and no legislation of the United States, without the consent of such persons, can impair this obligation, or excuse the performance of the duty it clearly imposes.

"From this statement of the case, the first question that naturally presents itself is, What was the character of the interest the United States had in the premises in 1836, or had they any interest at that time in the soil?

"In March, 1819, Congress passed an act to enable the people of Alabama Territory to form a constitution and State government, and for the admission of such State into the Union on an equal footing with the original States. That act declares that all navigable waters within the said State shall for ever remain public highways, free to the citizens of said State and the United States. What is the footing on which the original States stand in regard to the shores of their navigable rivers, and the soil covered by them? That footing is certainly the perfect and absolute control of the shores of those rivers in the respective States, except so far as the United States government may find it necessary to use them in the legitimate exercise of its constitutional rights. For the purpose of enabling itself to do this, so far as Alabama is concerned, it has not thought proper to assert any rights of ownership in the shore, but has rather relinquished the idea of such ownership in itself, and recognized it in the State, by stipulating for a free use of said shores by the citizens of the United States.

"What has been said is based upon the assumption that, by the treaty with Spain, the United States acquired the

same property in the shores of navigable rivers that Spain had, and that they had, by the act of 1819, transferred the rights acquired under the treaty to the State of Alabama, reserving only the easement of navigation to the citizens of the United States. The question then arises, Could the United States, in contravention of the obligation they had incurred under the Spanish treaty, ratify and confirm these Spanish grants?

"If Spain could have granted the shores of navigable rivers, and the same power that Spain had had been conferred upon the United States by the treaty of 1819, and in pursuance of that treaty, and the pledges therein given, the United States had confirmed this grant prior to the admission of Alabama into the Union, there can be no doubt that the plaintiff's title would have been valid; but this was not done.

"Before it is done, the United States place themselves in a position where they cannot do it. Whether they ought to have placed themselves in that position, or what are the *consequences of this act, so far as the Spanish government is concerned, or the inviolability of the treaty [*475 between the two nations, it is needless now to inquire. If wrong has been done, the law of nations indicates the remedy. We must look at things as they are, and so viewing, the court is impelled to the conclusion, that if, at the time of the admission of the State of Alabama into the Union, the land described in plaintiff's declaration was below ordinary high-water mark, there was no interest in the same in the United States in 1836, and that the act of confirmation, and the patent in pursuance thereof, could not aid plaintiff's title, and that the same is invalid and unsound."

To which charge the plaintiff excepts, and prays the court to sign, seal, and certify this bill of exceptions, which is done.

Under these instructions, the jury found a verdict for the defendant, and, the case being carried to the Supreme Court of Alabama, that court affirmed the judgment of the Circuit Court.

A writ of error then brought the case up to this court.

It was argued by *Mr. Phillips*, and *Mr. Coxe*, for the plaintiffs in error, and *Mr. Campbell*, for the defendant in error.

It is not thought necessary to insert those parts of the arguments of counsel relative to the effect of the admission of Alabama into the Union upon the subsequent power of Congress to grant land between high and low water mark upon navigable rivers. The court, in its opinion, considers

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that point as settled in the case of *Pollard v. Hagan*, 3 How., 212. The counsel for the plaintiff in error, however, drew a distinction between that case and the present, as follows.

The case as now presented, however, differs materially from the case of *Pollard v. Hagan*, in 3 How. The Spanish concession was not then before the court, and the acts and patent relied upon were all subsequent to the date of admission.

The concession to Pollard, made while Spain was in the undisturbed possession of the territory, by every principle, either of national or municipal law, gave him a claim of title upon this government, which it was bound in good faith to perfect. It is true that, if the political departments refused to discharge their obligation, the courts of justice could not enforce it; but the want of this sanction in no wise impaired its obligatory force.

Having by the treaty with France, in 1803, acquired our title, and by the treaty with Spain, in 1819, termed on its face *476] a treaty of cession, confirmed our possession to this territory, treaty stipulations and the law of nations arose to control the action of the government as strongly as if the duties were imposed by constitutional provision.

The annexation of this acquisition to the Mississippi Territory by the act of 1812 did not obstruct the exercise of those high duties, nor did the authority given by Congress that the State of Alabama might be carved out of it produce this consequence. The people of that State would have spurned an advantage founded upon a violation of national faith.

That Pollard's title was the subject of a confirmation by Congress is expressly ruled, when this case was first presented, in 14 Peters, the court there citing the decision of Judge Marshall in *De la Croix v. Chamberlain*, "that the United States had never, as far as we can discover, distinguished between the concessions of land made by the Spanish authorities within the disputed territory, while Spain was in actual possession, from concessions of a similar character made by Spain within the acknowledged limits." The court, therefore, concluded that Pollard's claim was within the exception of the act of 1824, reserving all cases where the Spanish government had made a "new grant" during the time at which they had the "power" to grant the same (p. 364).

All the circumstances constituting the history of the times justify the declaration that, in the admission of the State, neither of the contracting parties understood that the politi-

cal obligations resting upon this government, as the successor of Spain, to perfect the titles of individuals acquired in good faith under Spanish dominion, were at all impaired; the more especially as it is not pretended that their fulfilment would in any manner work an injury to any public or private interest.

That the proprietorship of the soil between high and low tide belongs to the public, and may be acquired by individuals either by grant or by prescription, is a doctrine of the common law, taught by Sir Matthew Hale in his treatise *De Jure Maris* (1 Hargrave's Law Tracts, p. 37), citing Bracton, who, in turn, quotes the Roman civil law from Justinian's Digest. *Constable's Case*, 3 Co., 105, 107. There being but this distinction between the common and civil law, that the former confines this right to the "sea-shore, arms of the sea, bays, and rivers where the tide ebbs and flows," while the latter extends the right to include all "navigable rivers." *Ingraham v. Wilkinson*, 4 Pick. (Mass.), 273

The government, therefore, had the right to grant to Polard the fee of the soil, subject only to the restraints imposed by the *public interest and convenience. *Blundell v. Colvel*, 5 Barn. & Ald., 267; *Browne v. Kennedy*, 5 [477 Har. & J. (Md.), 195; *Hagan v. Campbell*, 8 Port. (Ala.), 9; *Mayor v. Eslava*, 9 Id., 596.

The counsel for the defendant in error noticed this subject in his third and sixth points.

3. The decisions of this court reported in 3 How., 212, and 16 Pet., 367, are directly against the right of the United States to grant the shore after the admission of Alabama into the Union. Such being the law upon this question, the only inquiry is, whether the production of an incomplete Spanish title (a mere permit to occupy) can change the result. This court has repeatedly decided that such a paper can give the party no standing in the court, no matter when it was executed. 12 Wheat., 599; 4 How., 449.

This court has also decided, that a complete grant bearing date at the time this does (1809) can give the party no right to be heard in the courts of the United States. *Foster v. Neilson*, 2 Pet., 253; 12 Pet., 511.

The party cannot, then, rest upon his Spanish title.

6. The opinion of the Supreme Court, reported in 3 How., 212, was very deliberately given. A motion for a rehearing was refused. The opinion comprehends within its principal property to a very large amount, and possessions and contracts have been made with respect to it.

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In the State of Alabama, the Supreme Court has repeatedly acted in accordance with it, and has regarded it as the settled law of the land. An opinion so given, entering so far into the law of property of the country, cannot be questioned without producing great confusion, 8 Ala., 909, 930; 7 Ala., 883.

Mr. Chief Justice TANEY delivered the opinion of the court.

This is an action of ejectment brought by the plaintiff in error to recover a lot of ground in the town of Mobile, in the State of Alabama. The plaintiff claimed title under an inchoate Spanish grant, dated December 12, 1809, and an act of Congress confirming this title, passed July 2, 1836, and a patent from the United States, dated March 15, 1837, which issued in pursuance of the act of Congress.

The validity of this title was disputed by the defendant, upon the ground that the premises were a part of the shore of a navigable tide-water river, lying below high-water mark, when the State of Alabama was admitted into the Union in 1819; and that therefore, at the time of the passage of the act of Congress, the sovereignty and dominion over the place *478] in question were in the State, and not in the United States. And the court instructed the jury, that, if the land described in the plaintiff's declaration was below ordinary high-water mark at the time Alabama was admitted into the Union, the confirming act of Congress and the patent conveyed no title to the patentee.

The question decided in the State court cannot be regarded as an open one. The same question upon the same act of Congress and patent was brought before this court in the case of *Pollard v. Hagan*, at January term, 1845, reported in 3 How., 212. That case was fully and deliberately considered, as will appear by the report, and the court then decided that the act of Congress and patent conveyed no title. The decision of the Supreme Court of Alabama, from which this case has been brought by writ of error, conforms to the opinion of this court in the case of *Pollard v. Hagan*. And it must be a very strong case indeed, and one where mistake and error had been evidently committed, to justify this court, after the lapse of five years, in reversing its own decision; thereby destroying rights of property which may have been purchased and paid for in the mean time, upon the faith and confidence reposed in the judgment of this court.¹ But, upon

¹ APPLIED. *Cromie v. Trustees of Wabash &c. Canal*, 71 Ind., 212.

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a review of the case, we see no reason for doubting its correctness, and are entirely satisfied with the judgment then pronounced.

It has been supposed, in the argument for the plaintiff, that the proceedings in Congress upon the report of the commissioners in relation to the title claimed under the Spanish authorities, which have now been referred to, distinguish this case from that of *Pollard v. Hagan*. But this Spanish title was acquired in 1809, and it has been repeatedly decided that a Spanish grant in this territory, whether inchoate or complete, made after the treaty of St. Ildefonso, in 1800, did not convey any right in the soil to the grantee. And this subject was again considered and decided, after careful research and examination, at the present term, in the case of *Reynes v. United States*, and the former decisions reaffirmed. Undoubtedly, Congress might have granted this land to the patentee, or confirmed his Spanish grant, before Alabama became a State. But this was not done. And the existence of this imperfect and inoperative Spanish grant could not enlarge the power of the United States over the place in question after Alabama became a State, nor authorize the general government to grant or confirm a title to land when the sovereignty and dominion over it had become vested in the State.

The judgment of the Supreme Court of Alabama is therefore affirmed.

ORDER.

[*479]

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Alabama, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court in this cause be, and the same is hereby, affirmed, with costs.

LESSEE OF ISAAC ATKINSON, PLAINTIFF IN ERROR, v. JOHN CUMMINS.

The rule of evidence, as stated by Tindal, Chief Justice, in the case of *Miller v. Travers* (8 Bing., 244), sanctioned by this court, viz.:—"In all cases where a difficulty arises in applying the words of a will or deed to the subject-matter of the devise or grant, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence may be rebutted or removed by the production of further evidence upon the same subject cal-

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culated to explain what was the estate or subject-matter really intended to be granted or devised."

Therefore, where the sheriff sold a tract of land under a *feri facias*, and made a deed of it to the purchaser, and it appeared afterwards that the debtor had two tracts near to, but separated from each other, and the sheriff's deed described one tract accurately except that it called to bound upon two parcels of land which were actually contiguous to the other tract, and the purchaser took possession of that to which the description was mainly applicable, and retained possession for nearly twenty years, parol evidence was admissible to show that the levy and sale applied to one tract only, and not both.¹

¹ Where reference is made in deeds to a recorded plat, and in an ejectment suit, evidence is offered to show that this plat differs from the original plat, the evidence ought not to be admitted. If an error existed, the proper remedy is in chancery to reform the deed. *Jones v. Johnson*, 18 How., 150.

Parol evidence, not inconsistent with a written instrument, is admissible to apply such instrument to its subject. *Noonan v. Lee*, 2 Black, 499. *S. P. Edwards v. Tipton*, 77 N. C., 222.

Where a conveyance of real estate is made to the grantee, as "trustee" without setting forth for whom or for what purpose he is trustee, parol evidence is admissible to establish the fact. *Union Pacific R. R. Co. v. Durant*, 5 Otto, 576.

Previous and contemporary transactions and facts may be very properly taken into consideration to ascertain the subject-matter of a contract, and the sense in which the parties may have used particular terms, but not to alter or modify the plain language which they have used. *Brawley v. United States*, 6 Otto, 168.

When a deed of a town lot refers for description of the lot to the official map of the town plat, parol evidence of the actual survey may be received to correct the boundaries of the lot as indicated by the map. *O'Farrell v. Harvey*, 51 Cal., 125.

Declarations of a grantor, made at uncertain times before and after the conveyance, not being part of the *res geste*, are not admissible to explain what he intended to grant by the deed. [Two judges dissenting.] *Aguirre v. Alexander*, 58 Cal., 21.

When land is described in a deed by metes and bounds, evidence is admissible to show that the particular

plat in controversy is not included in such description. *Maguire v. Baker*, 57 Ga., 109.

Where all the rights and appurtenances to the premises are conveyed by the deed, parol evidence is competent to show that the use of an alley was one of such rights. *Kirkpatrick v. Brown*, 69 Ga., 450.

When the language describing the land conveyed is doubtful, parol evidence of the construction given to the deed by the subsequent acts of the parties thereto, is admissible. *Lovejoy v. Lovett*, 124 Mass., 270.

Where a sheriff's deed described land sold under execution as situated in "township thirty." Held, that parol evidence was admissible to show that it was, in fact, situated in "township thirty-six." *Terry v. Berry*, 13 Nev., 514.

Evidence of practical location is permissible only where there is an ambiguity in the description or uncertainty in its application to the premises granted, or where the location operates as an estoppel *in pais*. *Baldwin v. Shannon*, 14 Vr. (N. J.), 596.

In the construction of any written instrument, it is competent to prove, by extrinsic evidence, the facts surrounding the parties, so that the court may see what they saw and know what they knew, not to vary or alter the writing, but to give it effect and carry it out according to its intent; and when it is apparent upon the face of the instrument that something was contemplated and agreed upon by the parties, which they have not distinctly defined or expressed with sufficient clearness, parol proof connecting the instrument with the subject-matter is allowable. *Greenpoint Sugar Co. v. Whitin*, 69 N. Y., 328, 336. A party may show any facts and circumstances

Atkinson's Lessee v. Cummins.

THIS case came up, by writ of error, from the Circuit Court of the United States for the Western District of Pennsylvania.

It was an action of ejectment brought in the Circuit Court by Isaac Atkinson, a citizen of Ohio, to recover a tract of land in Derry township, Westmoreland County and State of Pennsylvania.

The whole case was stated in the bill of exceptions, which it is only necessary to recite.

Copy of Bill of Exceptions.

"In the Circuit Court of the United States, Western District of Pennsylvania.

"RICHARD SMITH, Lessee of ISAAC ATKINSON, a Citizen of the State of Ohio, v. WILLIAM STILES, with Notice to JOHN CUMMINS, a Citizen of the State of Pennsylvania.

"November Term, A. D., 1846.—Action of Ejectment.

"Be it remembered, that at the November term, A. D., 1846, of the said court, before the Honorable R. C. Grier, an associate justice of the Supreme Court of the United States, and the *Honorable Thomas Irwin, judge of the said District Court, judges holding said court, at Pittsburg, [*480

surrounding the making of a contract, which would enable the jury to determine the subject-matter to which the contract was in fact applicable. *Bickett v. Taylor*, 55 How. (N. Y.) Pr., 126.

The court will not hold a description of land in controversy too indefinite to admit parol proof to identify it when such description calls for natural boundaries and the lines of adjoining proprietors, especially when the defendant admits in his answer that he withholds the possession of the land claimed by the plaintiffs. *Wellons v. Jordan*, 83 N. C., 371.

Extrinsic testimony is admissible to identify land described in a deed as "a tract or lot of land known as the east half of the south-west division of § 17," although such testimony shows that the land so conveyed is less in quantity than the mathematical half of the division. *Schlieff v. Hart*, 29 Ohio St., 150. Also to show that a heater and gas-fixtures were to pass to the purchaser of a house, under a

written agreement in which no mention was made of such articles. *Heysham v. Dettre*, 89 Pa. St., 506.

If there is any ambiguity in a deed as to the quantity of land conveyed thereby, arising from a conflict between the calls and the courses and distances, articles of agreement, in pursuance of which the deed was executed, may be admitted in evidence to show the intent of the parties. *Koch v. Dunkel*, 90 Pa. St., 264.

Parol evidence to show the locality of a line and corner designated in a grant as in another grant, *Held*, admissible. *Hughlett v. Connor*, 12 Heisk. (Tenn.), 83. And to show that erroneous courses and distances or recitals in a deed were inserted by mistake. *Jones v. Sharp*, 9 Heisk. (Tenn.), 660; *Elliott v. Horton*, 28 Gratt. (Va.), 766. See also *Bloomer v. Millinger*, 1 Wall., 340; *Clements v. Pearce*, 63 Ala., 284; *Baucum v. George*, 65 Id., 259; *Fisher v. Quackenbush*, 83 Ill., 310; *Crooks v. Whitford*, 47 Mich., 283.

in said district, the parties in this cause were at issue upon a plea of not guilty in manner and form as the said plaintiff hath thereof in his declaration complained, by said John Cummins, who had entered into and filed in said cause the common consent rule, confessing lease, entry, and ouster, &c., as appears of record in the same; and therefore a jury was called, and regularly and legally impanelled and sworn to try said issue; and on the trial thereof, the plaintiff, to prove the same on his part, gave in evidence the record of a judgment in the Court of Common Pleas of Westmoreland County, Commonwealth of Pennsylvania, in favor of Thomas Pumroy, for the use of John Sloan, junior, against George Pumroy, on the 5th day of September, 1820, for the sum of four hundred dollars debt and costs; also a writ of *fiere facias*, issued on said judgment from said court, dated December 2d, 1820, directed to the sheriff of said Westmoreland County, a levy by John Klingensmith, sheriff of said county, of said writ, on all the right, title, and claim of George Pumroy, of, in, and to a certain tract of land, situate in Derry township, adjoining land of James Henry, Nathaniel Doty, William Reed, William Bell, Robert Thompson, James Wilson, and others, containing 400 acres, more or less, about sixty acres cleared, thirty acres of which is in meadow, having thereon erected a grist-mill, shingle-roofed log dwelling-house, shingle-roofed log barn, with an apple-orchard thereon growing; and also of such further proceedings in the premises as showed a legal and valid sale by said sheriff of the premises so levied upon, as aforesaid, on the 18th of February, A. D., 1822, to one John Rhey, for the sum of fourteen hundred and one dollars; also a deed from said sheriff to said Rhey, for said premises so levied upon and sold as aforesaid, duly acknowledged in said court on the 9th day of April, 1822; and also evidence that, at the time of said levy and sale, said George Pumroy was the owner of said premises described in the plaintiff's declaration, and sought to be recorded in this action; also a conveyance in fee of said premises by said John Rhey, on the 16th of June, A. D., 1841, to said Isaac Atkinson. And the plaintiff, on said trial, for the purpose of exhibiting and defining what he claimed as embraced in said levy, sale, and conveyance to said Atkinson, as aforesaid, gave in evidence the plot or draft marked on the outside 'A, November 18th, 1846,' hereto attached, and herewith incorporated as a part of this bill, and claimed before said court and jury that said levy, sale, and conveyance to said Rhey embraced and contained the said land

represented in said *plot or draft by the black lines, [*481 embracing 326½ acres, and also 158½ acres, and gave evidence that William Bell and William Reed, two of the persons named as adjoiners of the said 158½ acres, as indicated on said plot or draft, are not adjoiners of any part of the 326½ acres. The defendant, on the contrary thereof, insisted and claimed that said levy and sale did not embrace or contain any part of the land described in the plaintiff's declaration (which is the same marked 158½ acres on the plot), but, on the other hand, was limited and confined to that marked on the said plot 326½ acres, &c.; and thereupon, after giving evidence to show that the improvements on the said last-mentioned tract of 326½ acres, &c., corresponded with the description in the levy, that the tract in dispute contained upwards of one hundred acres of cleared land, with an apple-orchard, a shingle-roofed log dwelling-house and barn and stable thereon erected, and that the said two tracts were entirely distinct, separate, and disconnected from each other, in order further to prove that said levy and sale did not embrace or contain any part of the land described in plaintiff's declaration, but, on the other hand, was limited and confined to that marked on the plot 326½ acres, called John Klingensmith, Esq., late sheriff of Westmoreland County, by whom the levy and sale in the case were made, and proposed to prove by him as follows:—That he went to the land of George Pumroy, in 1821, to make the said levy; that the said George Pumroy furnished him with the adjoiners of both tracts; that, upon inquiring of said Pumroy whether the description furnished embraced more than one tract, and learning from him that it covered both, he objected to making the levy in that way; that the said Pumroy acquiescing in his decision, he then struck off, as well as he could, the names given to him as adjoiners exclusively of the tract in dispute in this action, and supposed that he had stricken them all off; that on the inquisition held upon the levy, indorsed on the *fi. fa.*, the land in dispute was not submitted to the jury, or acted upon by them, but only what was called the mill tract, or, in other words, that upon which the purchaser entered after the sale; that at sale, upon a representation made to him by some of the bystanders that there was an ambiguity in the description of the land which rendered it uncertain whether one or both tracts were included within it, he stated, in the presence and hearing of John Rhey, that he was selling only the mill tract, and that bidders must govern themselves accordingly; that he made the same representation to Paul Morrow, by whom the property was purchased,

as the agent and for the use of said Rhey ; that, after the said *482] sale, he was directed to *execute the deed to said Rhey, which was accordingly done ; that, at the time of the execution thereof, it was again represented, and perfectly understood by both parties, that the property conveyed in said deed embraced only the mill tract, and not the land in dispute ; and that at a subsequent period, not very remote from the time of the said sale, upon a representation to him by some of the neighbours that the said Rhey was asserting his claim to the property in dispute under said sale, he took occasion to inquire of him whether the fact was as represented, to which the said Rhey replied that he might have said so in a jocular manner, but that he never intended to claim both tracts, for that he knew that he never bought both tracts, and that he never paid for both tracts, and to claim them now (then) would be too much like putting his hand into another man's pocket and robbing him.

"To the admission of which testimony of said Klingensmith, proposed to be given by the defendant as aforesaid, the plaintiff objected, and insisted that the same could not be legally admitted for the purpose aforesaid.

"Whereupon said court did overrule said objection, and admitted said testimony of said Klingensmith so proposed to be given as aforesaid, and the said plaintiff here in court, and during the trial of said cause, excepts to the judgment, opinion, and determination of said court in admitting said testimony ; and as the facts aforesaid do not appear of record, the said plaintiff prays that this bill of exceptions may be certified, signed, and sealed by the judges of said court, that the same may become part and parcel of the record in said case. By the court allowed and ordered to be lodged on file.

"R. C. GRIER, [L. S.]
THOMAS IRWIN. [L. S.]"

The jury found a verdict for the defendant.

Upon a writ of error sued out by the plaintiff, the case was brought up to this court.

It was argued by *Mr. Cooper*, for the plaintiff in error, and *Mr. Wylie*, for the defendant in error.

Mr. Cooper made the following points.

The court erred in admitting the testimony of John Klingensmith to contradict, vary, and limit the description of the bond as recited in the levy, *fieri facias*, *venditioni exponas*, and deed of the sheriff to the purchaser.

I. The levy, *feri facias*, *venditioni exponas*, sheriff's deed, *and acknowledgment thereof, are records, and parol [*488 evidence is not admissible to contradict, vary, or limit the description of the premises contained in them. The extent of the grant is only to be ascertained by levy, *feri facias*, *venditioni exponas*, and deed. *Sergeant v. Ford*, 2 Watts & S. (Pa.), 126; *Woodward v. Harbin*, 1 Ala., 104; *Hobson v. Doe*, 4 Blackf. (Ind.), 487; *Hellman v. Hellman*, 4 Rawle, 448, 449; *Patterson v. Forry*, 2 Pa. St., 456; *McClelland v. Slingluff*, 7 Watts & S. (Pa.), 134; *Aulenbaugh v. Umbehauer*, 8 Watts (Pa.), 50; *Beeson v. Hutchison*, 4 Id., 442-444; *Streaper v. Fisher*, 1 Rawle (Pa.), 155; *Grubb v. Guilford*, 4 Watts (Pa.), 223; *Haynes v. Small*, 9 Shep. (Me.), 14; *Lawson v. Main*, 4 Pike (Ark.), 184.

II. Natural monuments, clearly visible, such as a road, a stream, adjoining farms or lands, prevail over other marks, such as quantity, improvements, &c., and even over courses and distances. *Cox v. Couch*, 8 Pa. St., 147; *Howe v. Bass*, 2 Mass., 380-384; *Pernam v. Wead*, 6 Mass., 131-133; *Wendell v. Jackson*, 8 Wend. (N. Y.), 185-190; *Jackson v. Moore*, 6 Cow. (N. Y.), 706; *Newton v. Pigon's Lessee*, 7 Whart. (Pa.), 7, 11; *Cronister v. Cronister*, 1 Watts & S. (Pa.), 442; *Hare v. Harris*, 14 Ohio, 529.

III. George Pumroy, and Cummins, the defendant, who claims under him, being privy in estate, were in default in permitting the sheriff's deed to be acknowledged. Having stood by in silence when they should have spoken out, they are estopped from alleging that all that was levied upon and conveyed to the plaintiff by deed was not sold. This is also so in relation to the sheriff. *Zeigler v. Houtz*, 1 Watts & S. (Pa.), 540; *Sergeant v. Ford*, 2 Id., 127; *Streaper v. Fisher*, 1 Rawle (Pa.), 161; *Thompson v. Phillips*, 1 Baldw., 271.

IV. In cases of ambiguous or doubtful description, the court adopts the construction most liberal to the purchaser. This is true of purchasers at judicial as well as other sales. 1 Shepp. Touch., 82, 83; *Jackson v. Blodget*, 16 Johns. (N. Y.), 178, 179; *Jackson v. Gardner*, 8 Id., 394-406; *Doe v. Dixon*, 9 East, 15, 16; *Palmer's Case*, 2 Co., 74; *Inman v. Kutz*, 10 Watts (Pa.), 90-100; *Strein v. Zeigler*, 1 Watts & S. (Pa.), 259, 260.

Mr. Wylie, for the defendant in error, made the following points.

1. In Pennsylvania there is no court of equity, but equitable principles are applied, under the direction of the courts of law, in the same manner as legal principles. *Kuhn v. Nixon*,

15 Serg. & R. (Pa.), 118; *Hawthorn v. Bronson*, 16 Id., 278; *484] *Torr's Estate*, 2 Rawle (Pa.), 252. Ejectment is a substitute for a bill in equity, and may be defeated by the same considerations which would defeat a bill for a specific performance in a court of equity. *Pennock v. Freeman*, 1 Watts (Pa.), 408.

2. Equity will not permit a party to enforce compliance with a deed or contract, when such compliance would work a fraud on the other party. *Woollam v. Hearn*, 7 Ves., 211; 2 Atk., 98; Story, Eq., § 769. And parol evidence is admissible to show the fraudulent purposes. *Bowman v. Bittenbender*, 4 Watts (Pa.), 290; *Oliver v. Oliver*, 4 Rawle (Pa.), 141; *Hultz v. Wright*, 16 Serg. & R. (Pa.), 345; *Mitchell v. Kintzer*, 5 Pa. St., 216; Greenl. on Ev., § 248. And it is an admitted principle, that courts of law have concurrent jurisdiction with courts of chancery, in cases of fraud. *Gregg v. Lessee of Sayre*, 8 Pet., 244.

3. The evidence was for the purpose of applying the deed to its proper subject, and therefore competent. 1 Geenl. on Ev., § 301.

Mr. Justice GRIER delivered the opinion of the court.

The single question in this case arises on a bill of exceptions to the admission of certain testimony. In order to judge of its correctness, we must ascertain what was the matter in dispute before the jury at the time the testimony was offered and received.

The action was ejectment for a tract of land containing 158½ acres. In 1822, George Pumroy was owner of this tract, and also of another of 326½ acres, lying near to it, but not adjoining. A judgment had been obtained against Pumroy for the sum of \$400, and an execution issued, on which the sheriff returned that he had levied on "a certain tract of land, situate in Derry township, adjoining lands of James Henry" (and a number of others), "containing 400 acres, more or less, of which 60 acres were cleared land, and 30 acres of meadow, and on which were erected a grist-mill, dwelling-house," &c., &c. A sale was made by the sheriff under a writ of *venditioni exponas*, and a deed delivered by him to John Rhey, legally conveying to him the tract of land as described in the levy. Under this deed, Rhey took possession of the tract of 326½ acres, on which the grist-mill was erected, and has held it from the year 1822 till the present time. In 1841, he made a conveyance to Isaac Atkinson, the plaintiff's lessor, a citizen of Ohio, in whose name the present ejectment was

instituted for the other tract, owned by Pumroy, of 158½ acres, and now in the possession of the defendant, Cummins.

The only evidence offered in support of the plaintiff's claim *was, that two of the adjoining tracts, called for as [*485 boundaries in his deed, did not adjoin the mill tract of 326½ acres, but were contiguous to, and adjoined the tract of 158½ acres. It was admitted, that all the other parts of the description correctly applied to the larger tract, but it was contended that, if this portion of the description applied only to the other, the levy and deed for this reason included both.

The defendant, on the contrary, insisted that the levy and sale did not embrace any part of the land in dispute, and gave evidence to prove that it was a distinct and separate tract of land, having a house, barn, orchard, and 100 acres of cleared land, not occupied or used in connection with the larger or mill tract. They contended, also, that the deed called for but one tract of land, which was well described, except in this one particular, which was evidently an ambiguity, caused by a mistake of the sheriff in making his levy.

The defendant might, perhaps, have safely rested his case on the evidence as it now stood, but, in order to remove all possible doubt, he offered to prove by the sheriff "how the mistake in the description occurred; and that the purchaser and other bidders at the sale had remarked this ambiguity in the description, and were informed how it happened, and were perfectly aware that but one tract was levied on and offered for sale, called the mill tract. That Rhey, the purchaser, was fully aware of it, and accordingly claimed and took possession of the mill tract only; that the sheriff, having afterwards heard a report that Rhey was asserting a claim to the property in dispute, took occasion to inquire of him if it was true; and that Rhey replied, 'that if he had said so it was only in jest; that he had bought and paid for one tract only, and to claim them both would be too much like putting his hand in his neighbour's pocket and robbing him.'"

To the reception of this testimony the plaintiff's counsel objected, and the admission of it by the court forms the subject of the bill of exceptions now under consideration.

It is contended that this testimony ought not to have been received, because "the levy, *feri facias*, *venditioni exponas*, sheriff's deed, &c., are records, and parol evidence is not admissible to contradict, vary, or limit the description of the premises contained in them."

This proposition is undoubtedly true. But it assumes the very fact in dispute, and on which the jury were about to

pass, on parol proof given by both parties. It is true that, if a sheriff levies on a whole tract of land, and describes it accurately in his levy and deed, parol testimony cannot be received to show *that he intended to sell less than his *486] deed describes, or that he expected a part of the premises at the time of the sale.

But that is not the case before us. The testimony offered is not to contradict the levy and deed, but to explain and confirm them. The plaintiff's testimony had shown that there was a latent ambiguity on the face of his deed. It purported to convey a single tract of land; it described one tract completely, with a single exception which applied to another. It might be void for uncertainty, if its description equally applied to two tracts, while it clearly purported to convey but one. It might convey one, and the part of the description which did not apply to that would be rejected as *falsa demonstratio*, or misdescription. Or it might possibly be intended to convey both; but in the present case the latter supposition had hardly a shade of probability to support it.

It would be of little profit to notice the infinite variety of cases on this subject, or to seek for one precisely in point with the present. The general rule is well stated by Tindal, Chief Justice, in the case of *Miller v. Travers* (8 Bing., 244), that "in all cases where a difficulty arises in applying the words of a will or deed to the subject-matter of the devise or grant, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence may be rebutted or removed by the production of further evidence upon the same subject calculated to explain what was the estate or subject-matter really intended to be granted or devised."

The deed in this case called for but a single tract of land, the purchaser had himself taken possession and held up to certain boundaries for near twenty years, and had thus by his acts given his own construction of an ambiguity in his deed which he now showed by extrinsic evidence to exist. The evidence offered tended to confirm what appeared on the face of the deed; that but one tract was sold; that the practical location of this grant made by the purchaser was correct; that he had not acted under a mistake of his just rights, but had a due appreciation of the merits of the claim now set up to the land in question. This testimony may have been superfluous and unnecessary, but was not irrelevant or illegal. It did not contradict the record or deed under which the plaintiff claimed, but showed the gross injustice of the claim now attempted to be established under cover of an ambiguity in their terms.

The judgment of the Circuit Court is therefore affirmed.

The United States v. Brown.

ORDER.

This cause came on to be heard on the transcript of the *record from the Circuit Court of the United States for the Western District of Pennsylvania, and was argued [*487 by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

OBADIAH B. BROWN, PLAINTIFF IN ERROR, v. THE UNITED STATES.

THE UNITED STATES, PLAINTIFFS IN ERROR, v. OBADIAH B. BROWN.

An act of Congress passed on the 2d of July, 1836 (5 Stat. at L., 83), directs that, where any money has been paid out of the funds of the Post-Office Department to any person in consequence of fraudulent representations or by mistake, collusion, or misconduct of any officer or clerk of the Department, the Postmaster-General shall institute a suit to recover it back.

Where the person who was the chief clerk and treasurer of the Post-Office Department transferred to the Department a deposit which he had made, in his own name, in a bank which had become broken, and in consequence of such transfer received the whole value of the deposit from the Department, it was a case which fell within the statute; and the adjudication of the Postmaster-General, ordering the person to be credited upon the books and to receive the money, cannot be considered a final adjudication, closing the transaction from judicial scrutiny.

The rules and regulations of the Post-Office Department placed the whole subject of finance under the charge of the chief clerk. It was within the range of his official duties, therefore, to superintend all matters relating to finance, and he was not entitled to charge a commission for negotiating loans for the use of the Department.

THESE two cases were merely branches of a single case which was tried in the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington.

The suit was instituted by the United States against Obadiah B. Brown, upon an account, two items only of which were disputed. Upon one of these items the instruction of the court to the jury was unfavorable to Brown, and he took a bill of exceptions to it. This constituted the first case. Upon the second item, the instruction was unfavorable to the United States, and they excepted.

The account upon which the suit was brought was as follows, viz.:—

The United States v. Brown.

*488] *Obadiah B. Brown, late Treasurer Post-Office Department, in account with the United States.

DR.

CR.

| 1835. | | 1845. | |
|-----------|-------------|-------------------|---------------------------|
| Jan. 27. | To cash, | \$2,500.00 | Mar. 31. By amount of his |
| Feb. 18. | " cash, | 892.59 | bill, dated 14 Feb- |
| " 19. | " cash, | 2,088.61 | ruary, 1835, No. |
| April 10. | " cash, | 1,452.00 | 400, paid sundry |
| | | | persons for ser- |
| | | | vices in Post-Office |
| | | | Department. \$302.59 |
| | | | June 26. By amount paid |
| | | | sundry persons for |
| | | | services in Post- |
| | | | Office Depart- |
| | | | ment, as per bill |
| | | | on file, 1,452.00 |
| | | | Balance, . . . 4,588.61 |
| | | | <u>\$6,843.20</u> |
| | | <u>\$6,843.20</u> | |
| | To balance, | \$4,588.61 | |

The two items in dispute were the charges of \$2,500 and \$2,088.61. The first of these, viz. that of \$2,500, is not the first taken up in the bill of exceptions, or in the opinion of the court. In both, the latter item of \$2,088.61 is treated and disposed of in the first instance.

The whole of the facts in the case are set forth in the two bills of exceptions, which are recited in the opinion of the court. It is therefore unnecessary to repeat them here.

The cause was argued in this court by the Attorney-General (*Mr. Johnson*), for the United States, and by *Mr. Bradley* and *Mr. Coxe*, for Mr. Brown.

Mr. Johnson referred to the Post-Office Act of 3d March, 1825 (4 Stat. at L., 102), and made the following points.

1. That the fact being known to Mr. Barry, the Postmaster-General, that the Bank of Maryland had failed, and that the Union Bank held the certificates given to the former by the Post-Office Department, and that the certificate to Brown given by the Bank of Maryland was for his private account, he had no lawful authority to assume and pay the same to Brown.

2. That if he had, in the absence of all improper intent, there was evidence from which the jury might infer mistake of fact, collusion, or misconduct in the Postmaster-General in making such payment.

3. That there was no evidence from which the jury could infer that there was any agreement to allow the defendant

The United States v. Brown.

the commissions claimed by him, or from which it could be allowed. *Gratiot v. The United States*, 4 How., 110.

The counsel for Mr. Brown contended that, with respect to the item of \$2,088.61, the charge of the Circuit Court was correct, and fell within the ruling of this court in the case of **The United States v. The Bank of the Metropolis*, 15 Pet., 377, 400, 401; and with respect to the item of [*489 \$2,500, they contended:—

1. The services rendered by Mr. Brown, and for which he claimed this compensation, were not such as were ordinarily attached to the duties of the office held by him.

2. They were rendered at the instance of the government, and he was obliged, under the circumstances, to perform the labor, and assume the responsibility necessary to execute that service.

3. He was entitled to an equitable allowance for such extra service, to be graduated by the amount paid for like services under similar circumstances.

4. The Department had paid for like services, under similar circumstances, more than was demanded by him.

And to sustain these propositions they relied on *The United States v. MacDaniel*, 7 Pet., 1; *The United States v. Ripley*, 7 Pet., 25, 26; *The United States v. Fillebrown*, 7 Pet., 41.

Mr. Justice DANIEL delivered the opinion of the court.

This case is brought before us upon writs of error to the Circuit Court of the United States for the District of Columbia, holden for the County of Washington.

The facts of this case, and the questions of law arising therefrom, will appear in the following statement of the proceedings in the Circuit Court.

In the year 1839 the United States instituted an action on the case against the defendant in error, to recover of him the sum of \$4,588.61, in obedience to the directions of the seventeenth section of the act of Congress of July 2, 1836 (5 Statutes at L., 83), which declares, "That in all cases where any sum or sums of money have been paid out of the funds of the Post-Office Department to any individual or individuals under pretence that service has been performed therefor, when in fact such service has not been performed, or by way of additional allowance for increased service actually rendered when the additional allowance exceeds the sum which, by the provisions of the law, might rightfully have been allowed therefor, and in all other cases where moneys of the department have been paid over to any person in consequence of

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fraudulent representations, or by mistake, collusion, or misconduct of any officer or clerk of the Department, it shall be the duty of the Postmaster-General to cause suit to be brought in the name of the United States of America to recover back the same, or the excess, as the case may be, with interest thereon."

*490] *The declaration counted upon an *insimul computasent*, upon money paid, upon money lent and advanced, and upon money had and received. The account exhibiting the claim of the United States consisted of four items, and is in the following form.

"Obadiah B. Brown, late Treasurer Post-Office Department,
Dr. in account with the United States. Cr.

| 1835. | | 1845. | |
|-----------|-------------|-------------------|---------------------------|
| Jan. 27. | To cash, | \$2,500.00 | Mar. 31. By amount of his |
| Feb. 18. | " cash, | 802.59 | bill, dated 14 Feb- |
| " 19. | " cash, | 2,088.61 | ruary, 1835, No. |
| April 10. | " cash, | 1,452.00 | 460, paid sundry |
| | | | persons for serv- |
| | | | ices in Post-Office |
| | | | Department, \$802.59 |
| | | | June 26. By amount paid |
| | | | sundry persons for |
| | | | services in Post- |
| | | | Office Depart- |
| | | | ment, as per bill |
| | | | on file, 1,452.00 |
| | | | Balance, . . . 4,588.61 |
| | | <u>\$6,843.20</u> | <u>\$6,843.20</u> |
| | To balance, | \$4,588.61 | |

"I certify that the foregoing is a true statement of the account of Obadiah B. Brown, late treasurer of the Post-Office Department, as audited and adjusted at this office.

"In testimony whereof I have hereunto subscribed my name, and caused to be affixed my seal of office, at Washington, this 2d day of July, in the year 1839.

"C. K. GARDINER,
Auditor of the Treasury for Post-Office Department."

The second and fourth items of this account were extinguished by credits equal to their amount; the first and third items were alone contended for by the United States. The jury found a verdict for the plaintiffs for the first item, and rejected the third, under the instruction of the Circuit Court.

At the trial, bills of exception to the rulings of the court were sealed, at the instance of both the plaintiffs and the de-

pendant, and a writ of error is prosecuted by either party in this court.

The proofs set forth in the bills of exception, and the rulings of the Circuit Court upon the prayers appended to those bills, are made a part of this statement, so far as is necessary to present the questions brought up for review.

"The plaintiffs, to sustain the issues joined on their part, and to establish their right to recover the third item in the account, of \$2,088.61, gave evidence by competent testimony, that, on the 3d of May, 1833, the defendant made a private deposit of his own funds in the Bank of Maryland, of the sum of \$2,000, *bearing interest at the rate of five per centum per annum, and received a certificate therefor. [*491 That the defendant was at the time of said deposit, and continued until the 1st of February, 1835, to be, the chief clerk and treasurer of the Post-Office Department. That on the 5th of June, 1833, the Post-Office Department borrowed of the Bank of Maryland \$50,000, payable at nine and twelve months, and gave to the said bank two certificates of \$25,000 each, in acknowledgment of this loan. These certificates were signed by the defendant, as treasurer of the Department. That on the 22d of June, 1833, the Bank of Maryland borrowed of the Union Bank of Maryland \$50,000, and deposited said loan certificates as collateral security therefor.

"That on the 22d of March, 1834, the Bank of Maryland failed, and the Post-Office Department, shortly after, knew of that fact. That on the 22d of March, 1834, the Bank of Maryland made a general assignment to John B. Morris and Richard W. Gill, as trustees for the benefit of its creditors. And that both the Post-Office Department and defendant were notified of said assignment to the Union Bank of the post-office certificates, as early as the 8th of April, 1834.

"That immediately on the announcement of the failure of the Bank of Maryland, its certificates of deposit depreciated in value to the amount of eighty per cent., and continued gradually to depreciate until some three or four years after, when they had fallen as low as twenty-five per cent. That on or about the 9th of September, 1834, N. Williams, Esq., the District Attorney of the United States, and acting as such, procured to be made on said certificate of deposit given to said defendant the indorsement thereon signed by J. B. Morris and R. W. Gill.

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“ ‘Mr. Wilson, *Cashier* :—

“ ‘Release the within certificate, with interest up to the 22d of March, on deposit to be checked for.

“ ‘J. B. MORRIS,
R. W. GILL, *Trustees*.

“ ‘3d September, 1834.’

“And said certificate, with the indorsement of the defendant Brown, and of said Morris and Gill, was then by him presented to the Bank of Maryland by said Williams, acting as aforesaid, and the said certificate was then and by it cancelled, and a credit given for the amount, with the interest up to 22d March, 1834, to the Post-Office Department, being the *492] amount of two *thousand and eighty-eight dollars sixty-one cents: this credit was given on the 9th of September, 1834, and in a day or two after, on the receipt of the account showing said credit, corresponding entries were made on the books of the Department, charging said bank, in general account, with said sum of two thousand and eighty-eight dollars sixty-one cents, and crediting O. B. Brown, Treasurer, &c., with the like sum.” That early in February, 1835, the defendant retired from his office in the Post-Office Department, and afterwards, on the 19th of February, 1835, the Postmaster-General caused a requisition to be made out in favor of the defendant for the sum of \$2,088.61; and upon this requisition a corresponding check was drawn, payable to his order, for the like amount, which, being indorsed by him, was duly paid, which sum so paid is that now sought to be recovered. That on or about the 5th of December, 1836, an arrangement was made between the said Union Bank and the then Postmaster-General, under which the defendant was recharged with the sum of \$2,088.61, and the Union Bank thereupon gave the bond of indemnity in the following words.

“ ‘Know all man by these presents, that we, the President and Directors of the Union Bank of Maryland, and Robert Mickle, of the State of Maryland, are held and firmly bound unto the United States in the full and just sum of four thousand dollars, current money of the United States, to be paid to the said United States; to which payment, well and truly to be made, we bind ourselves and each of us, firmly and severally, by these presents. Sealed with our seals, and dated this 5th day of December, in the year 1836.

“ ‘Whereas, Amos Kendall, Postmaster-General of the United States, hath allowed and paid to the President and

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Directors of the Union Bank of Maryland the sum of two thousand eighty-eight $\frac{81}{100}$ dollars, claimed to be due to the said bank from the Post-Office Department, which claim was disallowed by William T. Barry, former Postmaster-General of the United States, and the amount so claimed by the said bank was paid to a certain O. B. Brown by the said Barry, on the ground that a debt due to the said Brown from the Bank of Maryland could be legally set off against the claim of said Union Bank; and the said Amos Kendall, as Postmaster-General as aforesaid, having allowed and paid the claim of said Union Bank, and recharged the said O. B. Brown with the amount so received by him, is about to sue the said O. B. Brown for the same, in which suit the validity of said set-off may be brought in question.

*“Now, the condition of the above obligation is [493 such, that, if the validity of said set-off should in the said suit be sustained by a judicial decision, and the said Union Bank shall thereupon, on demand, fail to repay the said sum of two thousand and eighty-eight $\frac{81}{100}$ dollars, with legal interest thereon from the time they received the same, the above obligation to be in full force; otherwise to be void.

“H. W. EVANS, [SEAL.]

President of the Union Bank of Maryland.

R. MICKLE, [SEAL.]

“Signed, sealed, and delivered in presence of
CH. A. WILLAMSON.’

“Whereupon the plaintiffs closed their testimony; and the defendant prayed the court to instruct the jury that, on the evidence aforesaid, if believed by the jury, the plaintiffs are not entitled to recover the said item of \$2,088.61.

“And the court, being of the opinion that, by the evidence aforesaid, it appeared that the former Postmaster-General (Barry) had, within the scope of his official authority, and with full possession of the facts involved in the case, adjudicated the question of the right of the defendant to receive the said item of \$2,088.61, and, under the said adjudication, the same had been paid to the defendant, and that this court has no authority to review and reverse the said adjudication for errors of law therein, and that, from the evidence aforesaid, the jury cannot infer mistake of fact, collusion, or misconduct of the said Postmaster-General, gave the instruction as prayed, to which instruction as given, the plaintiffs excepted.

“The defendant having admitted the receipt by him of the sum of \$2,500, as charged in plaintiffs’ account, offered and read in evidence an account presented by him to the

Department, claiming sundry allowances as for commission for the disbursement of sundry sums made by him from the contingent fund of the Post-Office Department, and for the like commissions on the sum of \$190,000, being the amount of sundry loans negotiated by him, at the request of the Postmaster-General, for the use of said Department, as charged and claimed in said account, and then gave evidence tending to prove, by credible and competent witnesses, that he, the said defendant, while chief clerk of the Post-Office Department, was employed by the said Postmaster-General to negotiate said loans; that he faithfully performed that duty, and did negotiate the several loans for the sums with the parties, and at the times mentioned in the items of *494] charge in his account. He further gave *testimony tending to show that no loans were ever made and negotiated by or for the use of the Department, except during the period when Major Barry held the office of Postmaster-General, and that no other officer or clerk attached to the General Post-Office had ever been employed in the negotiation of any loans for the use of said Department; that during the same period of time another person, viz. Samuel L. Gouverneur, then postmaster at New York, was, in like manner, employed to negotiate similar loans for the use of said Department, as a special agent; that loans were thus negotiated by said Gouverneur, as such special agent, sometimes at a very high premium, on one occasion paying for the same at the rate of three per cent. per month, besides collateral advantages to the lender; that for the loans thus negotiated by said Gouverneur he claimed and was allowed five per cent. commission when he lent his own personal responsibility, and two and a half per cent. when he incurred no responsibility; and these commissions were allowed and credited him by the Department in the settlement of his accounts; that the defendant, in the negotiations intrusted to him, went personally to Baltimore and Philadelphia, where the same were conducted and effected, and that he has never received any remuneration for his services, or for his expenses in attending to said business.

"The defendant further gave parol evidence, tending to show that no negotiations of loans, other than those made by the defendant, were ever made by the Post-Office Department, or by the Department's chief clerk, and such duties had never, before or since, been performed by any other chief clerk or treasurer, and that if any other person had been employed to perform said business, not connected with the Department, such person would have claimed and received a

compensation of two and a half per cent. commission on the amount so borrowed.

"And thereupon, the plaintiffs offered further evidence to prove that, during all the time aforesaid in which the loans aforesaid were negotiated by the defendant, he was chief clerk and treasurer of the Post-Office Department, and as such received a stated salary fixed by law, and, as treasurer, had charge of the financial duties of the Department; that the general outline of his duties is stated in the published rules and regulations of March 4, 1833, issued by the Postmaster-General, but there were other minor duties for which there were verbal directions; that the disbursements of the contingent expenses of the Department, and the settlement of accounts therefor at the Treasury, down to the year 1815, had been by the Postmaster-General, and since that year by officers of the *Department assigned to that duty in addition to their other duties; that the defendant was [*495 disbursing agent from 1829 to some time in February, 1835, and as such settled quarterly accounts of his agency at the Treasury; that no allowance had ever been made for such services beyond the stated salaries of the officers, and none had been asked for by any officer except by the defendant, long after he had settled his accounts, and had retired from office; that before, and during, and ever since the years 1833 and 1834, in which said loans were negotiated by defendant, it was the frequent usage of the Department for the Postmaster-General to send its officers to points of the country distant from the office, or special business connected with their respective branches of the service, and they had never claimed or been allowed any compensation therefor, except their actual expenses, in addition to their stated salaries, which continued to run on during their absence, and that no distinction was known or recognized in this respect between the financial and other divisions of the department; that during his treasurership the defendant had made no claim for commissions on the loans aforesaid made by him; that his predecessor in charge of the financial department was the First Assistant Postmaster-General, who held the office during several years, down to March, 1843, and during that time, by direction of the Postmaster-General, negotiated with distant banks for permission to make two overdrafts, of \$50,000 each, for which interest was to be allowed, and which were to be repaid by deposits of the revenues of the Department, as collected; that he rendered these services, as essential portions of his duties, under charge of the financial division of the Department, and never expected to receive any compen-

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sation therefor beyond his regular salary ; that no other loans are known to have been negotiated by the Department, nor are commissions known to have been allowed to officers of the Department for any special services rendered by them for the Department ; and further offered evidence to prove, that in the Treasury Department the contingent expenses and salaries of officers, amounting to the monthly sum of \$70,000, were always disbursed by officers of the Treasury assigned to the duty, in addition to their ordinary duties, without any charge or claim of extra compensation ; and that officers of this Department were sent on missions to New York connected with public loans, and were never allowed any compensation beyond their expenses.

"And the defendant further gave evidence tending to prove, that the arrangement made for the overdrawing of the \$50,000, made by the First Assistant Postmaster-General, was *496] performed *through the instrumentality of an agent in New York, acting under instructions from said assistant ; that it was not regarded as a loan, but as an agreement, upon the promise of regular deposits, sometimes leaving large balances in favor of the government to meet and pay the drafts of the Department, in case no funds belonging to it were at the time in deposit, to the extent of \$50,000 ; that the defendant had made similar arrangements for the Department with other banks, at different times, to the amount of \$500,000, and had never claimed compensation for this as an extra service, or received any such compensation therefor.

"Upon the whole of the evidence, so given by the parties respectively, the counsel for the United States prayed the court to instruct the jury as follows, viz. :— That on the whole of said evidence, if believed by the jury, the plaintiffs are entitled to recover the said sum of \$2,500, and that defendant is not entitled to set off against that item any value of his services in negotiating said loans, or for the disbursement of the contingent fund, as claimed by him in his said account. To the giving of which instruction, the defendant, by his counsel, objected, but the court overruled the objection, and gave the instruction as prayed ; to which ruling of the court the defendant excepted."

The inquiries arising upon this record involve, to some extent, an examination of the powers and duties of the Postmaster-General in the administration of his office, and embrace also a construction of the seventeenth section of the statute of June 2, 1835, with respect to the directions to the Postmaster-General to prosecute for any of the delinquencies or misfeasances enumerated in that section ; they imply, more-

over, an examination on the part of this court as to how far the acts of the defendant below, as characterized by the proofs on the record, fall within either category of a payment out of the funds of the Post-Office Department under pretence of services which have not been performed,—or of an allowance for services actually performed, exceeding the compensation permitted by law,—or of money paid over to a person in consequence of fraudulent representations,—or by mistake, or collusion, or misconduct of any officer or clerk of the Department.

Without undertaking, in the solution of these inquiries, to define with perfect exactness the powers of the Postmaster-General, or to deny or affirm any implied general power in that officer to make loans on the credit or responsibility of the government, we think it may be safely assumed that such a power, if vested in that officer, must be limited to acts inseparable *from the exigencies of the Department over [497 which he presides; acts necessarily incident to its regular, legitimate operations. It never can be extended to a right in the Postmaster-General, at his discretion, to contract loans, or to borrow money upon mere calculations of contingent or speculative advantage to the Department; much less can it embrace the right in this officer to deal *ad libitum* in stocks, or bonds, or evidences of debt, or in certificates of deposit, either with corporations or individuals, when these subjects of traffic can in no wise be connected with the necessary or beneficial operations of the Department, nor can, indeed, be in any sense connected with that Department, except to render the latter a guarantee for the profit of others, with whom such transactions may take place.

Under the principles here assumed, and which are deemed by this court to be undeniable, let us look more nearly at this payment of \$2,088.61, made by order of the Postmaster-General, to the defendant, and at the circumstances under which it was made, in order to ascertain how far such payment, and the retention of the amount by the defendant, are warranted by these principles. It should here be borne in mind, that for some time previously, and to a period of nearly eleven months after the failure of the Bank of Maryland, the defendant was not only the chief clerk, but the treasurer, of the Post-Office Department. He was, therefore, necessarily acquainted, not only with the internal details of the Department, and clothed with the control of its pecuniary operations, but was also acquainted with the condition and character of those from whom loans to the Department were obtained; indeed, he assumes much credit to himself for this knowledge, and his acts based

upon it, and makes them in part the foundation of his claim for commissions on the moneys he had negotiated. But in addition to this implication, it is stated in the proofs that the Post-Office Department was informed, in March, 1834, of the failure of the Bank of Maryland; and that as early as the 8th of April following, both the Department and the defendant were notified of the assignment to the Union Bank of the Post-Office certificates for \$50,000. However possible it may be, that the head of the Department remained individually ignorant of the several occurrences above mentioned, they warrant a fair, nay, a necessary, legal conclusion to affect him with every consequence deducible from facts which it was within the range of his duty to know. But whatever suppositions may be indulged with respect to the head of the Department, they cannot avert from the defendant the consequences of acts notoriously, designedly, and personally performed by himself.

*498] *Thus situated,—under these striking facts and circumstances,—being still the chief clerk and treasurer of the Department, with full knowledge of the failure of the Bank of Maryland, and of the transfer to the Union Bank of the certificates of debt for \$50,000, the defendant himself withdraws his depreciated certificate of deposit from the insolvent Bank of Maryland, and on the 9th day of September, 1834, more than five months after the failure of that bank, transfers it, with the interest which had accrued thereon, to the Post-Office Department at par. It is true he does not sign the order for the payment to himself, for he had a few days previously withdrawn from his situation in the Department, but he obtained from the Postmaster-General a requisition on the acting treasurer of the Department for payment, and obtained on the 19th of February, 1835, a check from that acting treasurer for the amount of his depreciated certificate, with the interest thereon, at par, and received payment at that rate. Upon considering the position laid down by the Circuit Court, that this transaction was within the scope of the official authority of the Postmaster-General, we are irresistibly led to inquire, What could have been its object? Could this possibly have been to improve the credit or to facilitate the operations of the Department? If so, how could either of these ends be promoted by wasting the money of the government, that it might become the holder of a claim upon a notoriously insolvent corporation? Could the object have been to possess a set-off against the claims held by the Union Bank? If so, then surely the defendant should have been allowed nothing beyond the value of the certificate procured from him, and that was literally nothing. If we could impute to the head of

the Department the design to favor a subaltern in office, this too would be equally irregular and inadmissible with either of the solutions above suggested. In no view of this transaction have we been able to regard it as falling within the scope of the Postmaster-General's authority. On the contrary, it has appeared to us as illegal and irregular, and, so far as the head of the Department was concerned, as perhaps flowing either from want of information, or from the absence of vigilant personal supervision of the details of office, and of the conduct of inferior agents. But whatever may be the true explanation of the course of the Postmaster-General, that explanation can have no bearing in justification of the conduct of the defendant, or in support of his pretension to withhold from the government the amount paid for his certificate. As the immediate actor throughout this transaction, giving it form and direction in all its progress, he could not but know the *right in which he held the certificate of deposit in the [*499 Bank of Maryland. He could not but know the failure of that bank, and the consequent worthlessness of the certificate held by him, and the injustice and fraud of the contrivance by which he palmed that certificate upon the government, and obtained thereby the amount of it at par. In this view of the transaction, we consider the payment to the defendant of the sum of \$2,088.61, by direction of the Postmaster-General, as illegal and void, and the case of the defendant as coming regularly within the meaning of the provision, which is mandatory in directing proceedings like the present for the recovery of moneys of the Department that have been paid over to any person in consequence of fraudulent representations, or by mistake or misconduct of any officer or clerk of the Department, and therefore as rendering the defendant liable to refund the amount so paid to him, with interest thereon.

In the decision of the Circuit Court upon the prayer to the second bill of exceptions, sealed at the instance of the defendant below, this court can perceive no error. Upon advertng to the printed rules and regulations for the government of the Post-Office Department adopted on the 4th of March, 1833, and referred to in the defendant's exception, we find in the eighth rule the following provision:—"The third division will be that of finance, under the superintendence of the chief clerk, Obadiah B. Brown, who shall be treasurer of the Department. There shall be under his control the book-keeper's, the solicitor's office, and the pay office."

The language of this rule, if standing singly, must be understood as sufficiently comprehensive to embrace everything

relating to finance,—to the fiscal concerns of the Department; and it must be perceived, too, that all the functions and duties comprehended within this rule are attached to the office of chief clerk. It is as chief clerk, and by virtue of his office of chief clerk, that the entire subject of finance and financial administration is devolved on him. The only singularity marking this arrangement is the fact of its associating the powers and duties created by it peculiarly with this defendant individually, by declaring that the division of finance shall be under the superintendence of the chief clerk, O. B. Brown.

But beyond this general provision, contained in rule eighth of the Post-Office regulations, it will be found on examination that the whole of the remaining rules, extending to number twenty-four, are made up of a detail of duties to be performed with respect to receipts, deposits of money, payments and *500] disbursements, by this treasurer, so constituted in virtue of his *office of chief clerk; for which last office he received a stated salary. By what course of reasoning, then, it could be shown that the peculiar or appropriate duties of this officer were not his duties, but were performed by him in lieu of some other agent, and became, therefore, the foundation for extra compensation, this court are unable to comprehend. Some instances of extra compensation allowed at the Department have been adduced in support of the claim of the defendant to commissions in this case, and several authorities have been cited from this court, which are supposed to tend to its establishment. With respect to the former, this court cannot consider them as entitled to the smallest weight; we feel bound to regard them as wholly irregular, and as examples rather to be censured and shunned, than as precedents to be approved and followed. Between the cases of *The United States v. Rippey*, of *The United States v. Macdaniel*, of *The Same v. Fillebrown*, relied on for the defendant, and that now before us, we can discern an obvious distinction. Without undertaking here to discuss the force of those decisions as authority upon this question, we may safely say that they were commended to the judgment of this court by the conviction that they were founded on services which appertained not to the regular official stations and duties of the claimants,—services, too, actually performed, and untinged by any hue or shade of contrivance or *mala fides*, and really beneficial in their character to those for whom they were performed. We deem it unnecessary further particularly to contrast those claims with that of the defendant in the case before us. But whatever may have been under-

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stood to be decided, or whatever may in truth have been decided, by the cases above mentioned, the principles established by this court in the decisions of *Gratiot v. The United States*, 4 How., 80, and of *The United States v. Buchanan*, decided, during the present term of this court, we consider as furnishing the true rule as to allowances for extra services; by that rule, we conceive that the pretension of the defendant to commissions on loans, as set forth in the proceedings in this case, must be utterly condemned. This court, therefore, approving of so much of the decision of the Circuit Court as disallowed those commissions, do hereby adjudge that the writ of error of the defendant below to this decision be dismissed; and disapproving as erroneous so much of the judgment of the Circuit Court as authorizes the said defendant to claim against the United States the amount of the certificate of deposit from the Bank of Maryland transferred by him to the Post-Office Department, we hereby adjudge and order, that this judgment be reversed, and that this *cause be remanded to the Circuit Court, to be proceeded in [*501 conformably with the principles herein above declared.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, reversed, and that this cause be, and the same is hereby, remanded to the said Circuit Court, with directions to award a *venire facias de novo*, and for such further proceedings to be had therein as may be in conformity to the opinion of this court, and as to law and justice may appertain.

THE UNITED STATES, PLAINTIFFS IN ERROR, v. JOHN S. ROBERTS AND JAMES F. REED, SURVIVORS OF JAMES ADAMS.

By the ninth section of the act of Congress passed in 1836 (5 Stat. at L., 81), it was enacted that the Postmaster-General was authorized to give instructions to postmasters for accounting and disbursing the public money. In 1838, the Postmaster-General gave instructions to all postmasters, that, where they paid money to contractors for carrying the mail, duplicate receipts were to be taken in the form prescribed, one of which the post-

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master was to keep, and the other was directed to be sent by the next mail to the Auditor for the Post-Office Department.

Where a payment was made to a contractor by the surety of a postmaster in his behalf, and no duplicate receipt forwarded to the Post-Office Department, nor any information thereof given to the Department until after a final settlement of the accounts of the contractor had been made, in which settlement the contractor was not charged with the amount of such payment, it was error in the Circuit Court to instruct the jury that they might allow a credit for it to the surety when sued upon his bond, provided they believed from the testimony that the contractor had not received more money than he was entitled to.

By an act passed on the 3d of March, 1825 (4 Stat. at L., 112), Congress declared that if any postmaster shall neglect to render his account for one month after the time, and in the form and manner, prescribed by law, and by the Postmaster-General's instructions conformable therewith, he shall forfeit double the value of the postages which shall have arisen at the same office in any equal portion of time, previous or subsequent thereto; or in case no account shall have been rendered at the time of the trial of such case, then such sum as the court and jury shall estimate as equivalent thereto.

Where, at the time of the trial of a suit by the United States against a postmaster and his surety, there was no return for an entire quarter and a fraction of the ensuing quarter, the proper mode of computing damages was to go back to a quarter for which there was a return, calculate from it the amount due for the deficient quarter and deficient fraction taken together, and then double the sum arrived at by this calculation.

The fraction is included, because the obligation to make a return is as binding upon *a postmaster who leaves office in the middle of a quarter, as if he remained in office until the end of the quarter.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the District of Illinois.

It was an action of debt, brought by the United States in the Circuit Court, on an official bond against John S. Roberts, who had been postmaster at Springfield, Illinois, and James F. Reed and James Adams, his sureties.

The facts in the case were these.

On the 3d of March, 1825, Congress passed an act (4 Stat. at L., 112), the thirty-second section of which enacted as follows, viz.:—

“That if any postmaster shall neglect to render his accounts for one month after the time, and in the form and manner, prescribed by law, and by the Postmaster-General's instructions conformable therewith, he shall forfeit double the value of the postages which shall have arisen at the same office in any equal portion of time, previous or subsequent thereto; or in case no account shall have been rendered at the time of trial of such case, then such sum as the court and jury shall estimate as equivalent thereto, to be recovered by the Postmaster-General, in an action of debt on the bond against the postmaster and his securities, and for which the securities shall be liable.” This was no new provision, being

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substantially a reënactment of the thirtieth section of the Post-Office act of 1810. 2 Stat. at L., 602.

In 1836 Congress passed another act (5 Stat. at L., 81), the ninth section of which gave to the Postmaster-General authority to prescribe regulations for the proper enforcement of the duties of postmasters.

Under this authority, Amos Kendall, then Postmaster-General, issued the following circular.

Letter.

"Post-Office Department, April 13, 1838.

"To

Postmaster at Springfield, Ill.

"Sir,—You are required, within two days after the close of each quarter, to forward your quarterly accounts to this Department; or, if there be no mail from your office within that time, then by the next mail. The quarters end on the 31st March, 30th June, 30th September, and 31st December.

"By having your accounts of mails sent, and mails received, *copied beforehand, up to the last day, you can finish [*503 the copies, make the calculations, and have them ready to be forwarded, in a few hours.

"As you have no right to use or credit out the money which belongs to the United States, it is required that you have the balance due at the end of each quarter ready to be paid on demand.

"The contractor named at the foot of this letter, who carries the mail on the route there stated, on which your office is situated, is authorized to demand and receive of you, either in person or by his agent, at the end of each quarter, so long as he shall actually carry the mail on said route, or until you shall be otherwise directed, the whole amount due from you to the United States, including the quarter then just terminated, as shown in your account current.

"Blank forms of orders and receipts (specimens of which, filled up, are hereto annexed) will be sent, for every collection, to the contractor. These forms, and no others, must be used in your payments to contractors. If the contractor call on you in person for the money, the orders will not be necessary, and you will take from him two receipts in the form prescribed, one of which you will keep, and send the other by the next mail to the Auditor for the Post-Office Department. If any other person call for the money as agent, he must produce to you two orders in the prescribed form, signed by the contractor, with the blank receipts annexed; and after you

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have paid him, he will fill up and sign both receipts, and leave both orders and both receipts with you; one of each you will forthwith send to the Auditor of the Post-Office Department, and retain the other.

"These claims and orders cannot be sold, negotiated, or transferred, and no credit will be allowed you for any payment to any other person than the contractor, or the persons named in his orders; nor in the latter case will credit be allowed, unless the order accompany the receipt; nor unless the receipt be dated on the day when the money is paid.

"When demand is made of you as herein prescribed, it is expected that you will make instant payment, and the contractor is instructed to report forthwith to the Department every refusal or failure on your part.

"Very respectfully, your obedient servant,

"AMOS KENDALL.

"Pay to Robert Allen,

Contractor on route No. 2,701.

*504] ~~"Do"~~ You will take care to write or stamp the name of your office on the outside of the packet containing your quarterly returns for each quarter.

"Auditor's Office, P. O. Dep."

Annexed to this letter were blank forms, which the postmaster was directed to follow.

There was also issued the following circular to contractors for carrying the mail.

"Post-Office Department,

183 .

"To

Contractor on Mail Route No.

"The postmaster at [and] are instructed to pay over to you, or your order, on demand, at the end of each quarter, so long as you shall actually carry the mail on said route, or until they shall be otherwise directed, the whole amount due from them to the Department, for the quarter then just terminated, as shown by their several accounts current.

"You are requested to make demand as soon as possible after the first day of the next quarter, and report to the Department every failure or refusal to pay, with the reasons therefor, whether given by the postmasters, or otherwise known to you.

"When you have received the balances due from all these postmasters, or as many of them as can be collected, you will

fill up, sign, and send to the Department the blank 'acknowledgment' sent to you, of which a specimen is annexed, showing the name of each postmaster, the name of his office, and the amount received from him, upon receipt of which a draft will be forwarded for any amount which may still be due to you; provided that, in case you fail to collect any one of said balances, no part of the balance due will be paid you until the Department shall be satisfied that you have used due diligence to effect the collection, and that it could not be done.

"Herewith you will also receive the proper number of orders and receipts, in blank, for collections on the above route; that is, an original and duplicate for each office, which you are required to use in all your collections from the postmasters. Similar blanks will be forwarded for each successive quarter. You will collect at the end of each quarter from those offices only which are named in the blanks sent to you for that quarter. If you apply for the money in person, the orders will be unnecessary, and you will fill up and hand to each postmaster from whom you may receive payment the original and duplicate *receipts, sent to you for his office,—one for his own use, the other to be sent to the [*505 Department. If you send any other person to call for the money at an office, you will fill up in his favor, and give him the two orders (original and duplicate) sent to you for that office, with the blank receipts annexed; and when he has received the money, he will fill up and sign the annexed receipts, and leave both orders and both receipts with the postmaster.

"You are not authorized to sell, negotiate, or transfer any of these claims, and no payment will be recognized by the Department unless made directly to you, or to the person named in your orders.

"Every order and every receipt must bear the true date of its signature, in default of which it will not be considered a good voucher at the Department.

"Very respectfully, your obedient servant."

Annexed to this letter also were blanks, and copies were sent to the postmasters.

On the 9th of July, 1840, John S. Roberts, being reappointed postmaster at Springfield, executed a bond to the United States, with James Adams and James F. Reed as sureties, in the penal sum of five thousand dollars, with the condition that he should well and truly execute the duties of the said office according to law and the instructions of the Postmaster-General, &c., &c.

The contractor for carrying the mail on route No. 2,701,

from Springfield in Illinois to Terre Haute in Indiana, was Robert Allen.

It appeared from the testimony of Thomas A. Scott, a clerk in the office of the Auditor of the Treasury for the Post-Office Department, that for the third quarter of 1840, Allen, the contractor, transmitted an acknowledgment for collection made on route No. 2,701; that, in this acknowledgment, the said Allen acknowledged no sum as received from said Roberts, and that, no receipt having been received from said Roberts, no charge was made on account of any such collection against said Allen for said quarter, nor was any credit given to said Roberts; but that deponent, considering that said Roberts was in default in respect to said quarter by not paying over his quarterly dues to the said contractor according to his duty under his standing instructions, and upon the printed receipts sent to the contractor for that purpose, regarded it as his duty to report said default for the information of the Postmaster-General, and did accordingly make such report on the 14th of November, 1840.

"And deponent further saith, that, for the fourth quarter *506] of *1840, the said Allen transmitted an acknowledgment for collecting on said route No. 2,701; that, in this acknowledgment, said Allen having reported no sum as collected from said postmaster, and the said Roberts having forwarded no receipt, no debit to the contractor, or credit to the postmaster, in like manner, was given for said fourth quarter of 1840.

"And deponent further saith, that, for the first quarter of 1841, the said Allen transmitted an acknowledgment of collections on said route No. 2,701, a copy of which is hereto annexed, marked I, and made part of this deposition; that, in this acknowledgment, the said Allen acknowledged himself to have received the sum of \$733.28 from J. W. Keys, the successor of said Roberts, for the part of said quarter said Keys was in office, but acknowledged no sum as received from said Roberts, and that neither did the said Roberts transmit any receipt of said Allen for said first quarter, nor for any part thereof, during which he remained in office."

It should be mentioned that, for the second quarter of 1840, Allen, the contractor, transmitted an account to the Department, in which he took no notice of a payment of \$956.87, which had been made to him by the postmaster at Springfield; but, the postmaster having transmitted Allen's receipt in proper form for that amount, Allen was charged and the postmaster credited with that amount.

In January, 1841, Allen alleged that he gave a receipt to

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James Adams, one of the sureties, for \$1,731.39, which Adams had paid to him at various times, and in various amounts. The receipt was without date, and as follows:—

“Received of John S. Roberts, Postmaster at Springfield, Ill., (per Gen. James Adams, one of his sureties,) seventeen hundred and thirty-one dollars $\frac{39}{100}$ of the amount due up to the 1st of January, 1841, to the Post-Office Department.

“ROBERT ALLEN.”

This receipt, however, was not transmitted to the Post-Office Department until 1843, as appears from the following deposition by P. G. Washington, then Auditor of the Treasury for the Post-Office Department.

“And deponent further saith, that whilst holding the office of chief clerk, to wit, about the 1st of March, 1843, a letter was received at the Auditor's office, and referred to deponent, according to the usual course of business, from J. Butterfield, Esq., then District Attorney, dated 19th February, 1843, and inclosing a copy of an affidavit made by said Robert Allen in this cause, and a copy of a receipt given by him to James *Adams, one of the sureties of said J. S. Roberts, for the sum of \$1,731.39, the said affidavit setting forth [*507 that said Allen drew for and received said amount at different times, and informed the Post-Office Department thereof by letter; and about the same time deponent had referred to him another copy of said affidavit and receipt, with a copy attached of an affidavit alleged to have been made also in this cause by the said J. S. Roberts, setting forth, among other things, that said Roberts had large items of set-off, which had been forwarded to the Post-Office Department, and been disallowed. And deponent then made an affidavit to rebut said affidavits, and with the same object procured affidavits to be made by said Elisha Whittlesey and said Thomas A. Scott, and having, on said occasion, fully examined the whole subject, became well satisfied, as he now is, that unless the said sum of \$1,731.39, drawn for and received at different times, was composed of sums which were afterwards, to wit, at the end of the quarter, merged in and covered by the sums for which the said Allen gave the proper receipts, and which he properly reported in his acknowledgments for such quarter, the said sum of \$1,731.39, as a separate and specific payment, never came to the knowledge of the Department, and was never charged to him, over and above the sums regularly reported, and at the same time charged to him, and credited to the said J. S. Roberts.

"And deponent further saith, that from the time a statement of the account of said Roberts was sent, as before stated, to wit, on the 29th January, 1842, for the information of the parties liable to the present, he, deponent, has had no knowledge whatever of any exceptions taken to said account, nor of any items of set-off on the part of said Roberts, except the pretended set-off founded upon the receipt of said Allen, which came first to the knowledge of deponent at the time and in the manner before stated, and long after the final payment was made to said Allen in September, 1842, for the balance due him for carrying the mails as before stated.

"And deponent further saith, that the original receipt of said Allen for \$1,731.89, before referred to, was also received at the Auditor's office in a letter signed by James Adams, for himself and J. F. Reed, and dated 14th January, 1843, but not, as deponent believes, before the copies were received, as before stated; and that deponent returned the said original receipt to said Adams in a letter dated the 11th May, 1843, as appears by a memorandum made at the time on a copy of said receipt, which deponent prepared and retained."

On the 7th of February, 1841, Roberts went out of office.

*508] "In January, 1842, a copy of Robert's account was transmitted to J. W. Keys, postmaster at Springfield, with instructions to present said account to the sureties of Roberts, and to inform them that a draft would be issued for the amount. The account was as follows, the first item being a balance due on the 9th of July, 1840 Roberts having been postmaster previous to that day.

"Account.

| | |
|---|-------------------|
| To balance, | \$372.58 |
| To account from July 9 to Sept. 30, 1840, | 921.40 |
| To balance on postages estimated to have arisen at his office, from Oct. 1, 1840, to Feb. 7, 1841, and doubled agreeably to the 32d section of the act approved 3d March, 1825, relating to the Post-Office Department, | 2,852.72 |
| | <u>\$4,146.70</u> |

Interest from 7th February, 1841.

"I certify that the foregoing is a true statement of the account of J. S. Roberts, late postmaster at Springfield, Ill., as audited and adjusted at this office; that the said J. S. Roberts did not render, as postmaster, an account current, as he was required to do, for the period from Oct. 1, 1840, to Feb. 7, 1841, inclusive, within one month after the expiration of said period, or at any subsequent time, and that I have esti-

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mated the postages received in said period at \$1,426.36, the basis of the estimate being the amount of postages received for the quarter next preceding, say from July 1 to Sept. 30, 1840, and the said sum of \$1,426.36 bearing the proportion to \$1,009.43 (the postages of said quarter) which 130 days do to 92 days (the number of days in said quarter); and that, having doubled the amount of said postages so estimated, agreeably to the thirty-second section of the act of 3d March, 1825, I have charged the same at \$2,852.72.

"In testimony whereof, I have hereunto subscribed my name, and caused to be affixed my seal of office, at Washington, this 17th day of June, in the year 1842.

[SEAL.] "ELISHA WHITTLESEY,
Auditor of Treasury for Post-Office Dep't."

It will be perceived by the above account, that the Auditor adopted a rule which was one of the points contested in the case; that for the quarter ending on the 30th of September, 1840, the amount of postage received was \$1,009.43; that having no actual return of the amount received after that day, he applied the rule of three to the case, and worked out the *result by the following method. As 92 days (the quarter ending on September 30th) are to \$1,009.43, [*509 so are 130 days (the time between September 30th and the 7th of February, 1841, when he went out of office) to the sum with which he was properly chargeable, viz. \$1,426.36. According to the act of Congress referred to in the commencement of this statement, this sum was doubled. It will be seen by the bill of exceptions that the jury, under the charge given by the court, doubled only the sum of \$1,009.43.

In June, 1842, Allen's contract for carrying the mail expired, and on the 9th of September, 1842, his account was reported for settlement to the Postmaster-General. It showed a balance due to Allen of \$881.37, which was paid on the 13th of September; but in this account no notice was taken of the alleged receipt by him, from Robert's surety, of the sum of \$1,731.39, no such payment having been brought to the notice of the Department.

In December, 1842, suit was brought upon the bond by the United States, in the Circuit Court of the State of Illinois.

On the 14th of January, 1843, J. Adams, "for himself and James F. Reed," wrote a letter to the Post-Office Department, inclosing a copy of the receipt (above mentioned) for \$1,731.39, signed by Allen, the contractor, and claimed credit for it in Roberts's account. This letter was received about the 1st of March.

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On the 11th of May, 1843, this receipt was refused and returned, for the following reasons, viz. :—

“ I further certify, that credit for said receipt was, and is, refused, for the reason that, by the ninth section of the act of 2d July, 1836, it is made the duty of the Postmaster-General to prescribe the manner in which postmasters shall pay over their balances; that the Postmaster-General, in performance of this duty, gave to Mr. Roberts certain printed instructions, constituting the only authority he had for paying over the money he had in his hands; and that the payment so alleged to have been made by Mr. Allen was in direct violation of said instructions, and an evasion of the object therein intended to be secured,—the said object being, by restricting such payments to the blanks sent from the Department for each quarter for that purpose, and by requiring the immediate transmission of one of said receipts when executed, to charge the contractor on account of the same quarter with the amount, and to pay him thereupon only the balance of pay remaining; that no such blanks were furnished for the payment in question; and that, *by using a manuscript receipt, not
*510] sanctioned by the instructions or practice of the Department, it remained in entire ignorance of any such payment, until the receipt was received from Mr. Adams, as before stated, and until the contracts of Mr. Allen had expired, and the full amount due him had been otherwise paid; and, finally, as the postmaster had no authority to make such payment, his surety, Mr. Adams, had none to make it for him.

“ In testimony whereof, I have hereunto subscribed my name, and caused to be affixed my seal of office, at
[SEAL.] Washington, this 6th day of November, in the year 1845.

“ P. G. WASHINGTON,
Auditor of Treasury for Post-Office Dep't.”

The defendants, at first, allowed judgment to go against them by default, but this was afterwards set aside, and they were allowed to plead. The death of the defendant Adams was afterwards suggested, and issue having been joined, the cause came on for trial in December, 1845, when the jury found the following verdict, viz. :—

“ We, the jury, find for the plaintiffs, and assess their damages at the sum of fourteen hundred and eighty-five dollars and twenty-nine cents; and the jury presented the following statement, made by them by direction of court, showing the calcu-

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lations and allowances by which their said verdict was made up, viz.:—The jury allow the amount of \$921.40, and for the quarter from October to December, estimated at \$1,009.43 doubled, making \$2,018.86

921.40

2,940.26

Deduct for receipt, 1,731.39

1,208.87

Interest on \$921.40

276.42

6

1,485.29

55.2840

5

276.4200

“Judgment.

“It is therefore ordered and adjudged, that the said plaintiffs do recover of and from the said defendants their debt in their *declaration mentioned, the sum of five thousand dollars, to be released and discharged upon the payment [*511 of fourteen hundred and eighty-five dollars and twenty-nine cents, the damages aforesaid, by the jury aforesaid assessed, as well as their costs and charges herein expended, and that they have execution therefor,” &c.

In the course of the trial the following bill of exceptions was taken.

Bill of Exceptions.

United States Circuit Court for the District of Illinois, December Term, A. D., 1845.

THE UNITED STATES OF AMERICA v. JOHN S. ROBERTS and JAMES F. REED, survivors of James Adams, deceased.

Be it remembered, that this cause came on to be tried on the 19th day of December, A. D., 1845, at the December term of the Circuit Court of the United States for the District of Illinois, the Hon. Nathaniel Pope presiding; and the said plaintiffs, to prove and maintain the issues on their part, first introduced in evidence the bond on which this suit was brought, a copy of which is attached to the declaration herein, and then introduced in evidence the following certified statement of the account of John S. Roberts, as postmaster at

Springfield, Illinois, to wit. (Then followed the certified account, as it has been stated above.)

The plaintiffs, further to prove the issues on their part, then read in evidence the deposition of Robert B. Rust, as follows. (Rust was a clerk in the Post-Office Department, and deposed that no returns had been made by Roberts for the quarter ending 31st December, 1840, nor for that part of the succeeding quarter between 1st January and 7th February, 1841.)

It was then admitted that Roberts went out of office on the 7th of February, 1841, and the plaintiffs there rested their case.

The defendants then offered in evidence the circular letter of instructions from Amos Kendall, the Postmaster-General, which has been given above. This was objected to on the part of the United States, but the objection was waived in the argument of the cause in this court.

The defendants then offered in evidence the receipt given by Allen for \$1,731.39, above stated, the introduction of which was objected to by the United States; but the court overruled the objection, and permitted the paper to be read to the jury, to which the plaintiffs excepted, on the ground that it did not appear that the claim of the defendants for the amount mentioned in said receipt had been presented to the Auditor of *512] the *Treasury for the Post-Office Department for settlement, and disallowed by him, and because the payment receipted for was in violation of law, and contrary to the instructions of the Postmaster-General.

The defendants then offered the certificate of P. G. Washington, Auditor of the Treasury, disallowing the claim, which certificate is given above.

The defendants then called Robert Allen, who executed the receipt, as a witness, and offered to prove by him the circumstances under which the said receipt was given. The plaintiffs, by their counsel, objected, first, to the competency of the said Allen as a witness in this suit, on the ground that he was interested in the result of this suit; and, secondly, because the said receipt was not given in the form prescribed by the Postmaster-General in his instructions; and, thirdly, that it was not competent for the said defendants to explain the said receipt by parol testimony; the court overruled the said objections, and allowed the said witness to testify; to which decision of the court the said plaintiffs, by their counsel, excepted.

And the said Allen testified that he was a contractor for carrying the mail on route 2,701, at and before the date of said receipt; that the money mentioned in the said receipt,

before the execution thereof, had been paid to him by James Adams, one of the sureties of the said John S. Roberts, in several small payments, for which he had given him receipts, that afterwards, some time in the month of January, 1841, he took up the said receipts, and gave him the said receipt for \$1,731.39; that he never reported the receipt of the said money to the Post-Office Department, but thinks that some time afterwards he advised said Department thereof by letter, but could not state at what time; that he ceased to be contractor for carrying the mail on the 30th of June, 1842; that in March, 1842, he received from the Postmaster-General a draft on the said J. S. Roberts for \$1,600; that he presented the same to the said Roberts for payment, and could get nothing upon it, and returned the said draft to the Postmaster-General unpaid; that he did not recollect whether it was before or after the receipt of said draft, that he advised the Post-Office Department of the reception of the money mentioned in the said receipt for \$1,731.39. Said Allen further stated, that the government was indebted to him, as contractor, five thousand dollars and upwards, and that he had repeatedly applied for his account unsuccessfully.

The said defendants then called James W. Keys, who testified that he succeeded the said Roberts, as postmaster at Springfield; that he took charge of the post-office at said place on the 7th day of February, 1841. He was then asked by the defendants, if, after he came into office, he made payments to Allen as contractor, and took receipts different from those prescribed by the Postmaster-General in the printed form; which question was objected to by the said plaintiffs, first, for the reason that no usages of the Post-Office Department can be proved variant from the printed instructions of the Postmaster-General; and, second, because no practices pursued by the said Keys, subsequent to the time Roberts went out of office, could affect the rights of the plaintiffs in this suit; which objections were overruled by the court, and the witness allowed to answer the question; to which decision the plaintiffs excepted.

The said witness then testified, that while in office he made several payments to Allen, as contractor, and took his receipts, but did not know if the said receipts varied from those prescribed by the printed instructions of the Postmaster-General; that he always took duplicate receipts, and by the next mail forwarded one of them to the Auditor for the Post-Office Department, and that they were passed to his credit; that after he went out of office, on the 27th September, 1841, he paid to the said Allen, as contractor, six hundred dollars,

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and took from him a receipt (which he produced) in the words and figures following, to wit:—

“Rec’d Sept. 27th, 1841, of James W. Keys, late P. Master at Springfield, Ills., six hundred and fifty dollars in part of the amt. due P. O. Dept., for the fractional quarter ending the 7th Sept., 1841.
“ROBERT ALLEN.”

That he took a duplicate of the said receipt at the same time, and immediately forwarded it to the Auditor of the Post-Office Department, and that his account there was credited with the amount of the same.

The defendants then introduced Allen Tomlin as a witness, who testified that he was postmaster in Galena, in the State of Illinois, from 1839 to the 4th of March, 1841; the witness was then asked, if he had been in the habit of making payments, as postmaster, to mail contractors, and taking manuscript receipts for such payments, which were passed to his credit at the Post-Office Department; which question was objected to by the plaintiffs’ counsel, on the ground that the rights of the said plaintiffs in this case could not be prejudiced by the acts or dealings of the said Tomlin; which objection was overruled by the court, and witness allowed to answer the question; to which decision the plaintiffs, by their counsel, excepted.

*514] *The said witness then testified, that he had, in several instances, when postmaster at Galena, as aforesaid, made payments to mail contractors, and took their receipts in manuscript; that he could not state whether such receipts varied from the printed forms or not, but that he always took duplicate receipts, and immediately forwarded one to the Auditor for the Post-Office Department, and such receipts were there passed to his credit.

The said defendants then called George Welch as a witness, who testified that he was a clerk in the post-office, at Springfield during the time the said Roberts held said office, and some time thereafter under his successor; that he thought the quarterly return of the said Roberts, as postmaster as aforesaid, for the quarter ending December 31, 1840, was made up and sent to the Post-Office Department. On cross-examination, the said witness stated that he had no distinct recollection of the said account for that quarter being made up or sent; that he could recollect no fact in relation to it; that when he said, on his direct examination, that he thought the accounts had been made up for that quarter and sent, he

merely thought so, because it had been the usual practice to make up and send the accounts for each quarter.

The defendants here rested.

The plaintiff then introduced and read in evidence the depositions of Thomas A. Scott and Peter G. Washington, showing the state of the accounts with the Department, the material part of which depositions has been given in the preceding part of this statement.

The plaintiffs, by their counsel, then requested the court to give to the jury the following instructions:—

I. If the jury believe from the evidence that the said John S. Roberts continued to hold and exercise the office of postmaster at Springfield, in the State of Illinois, from the date of the said bond, upon which this suit is brought, until the 7th day of February, 1841, and then went out of office, and that he neglected to render his accounts, as such postmaster as aforesaid, for the period from October 1, 1840, to February 7, 1841, inclusive, within one month after the time, and in the form and manner, prescribed by law, and by the Postmaster-General's instructions conformable therewith, or at any subsequent time, then the plaintiffs are entitled to recover double the value of the postages which arose at the same office in an equal portion of the time previous thereto, amounting to the sum of \$2,852.72, as certified by the Auditor of the Treasury for the Post-Office Department in his certified statement of the account of the said *John S. Roberts, as postmaster as aforesaid; which said instruc- [*515
tion was refused to be given by the court.

II. If the jury shall believe from the evidence, that the said John S. Roberts held and exercised the said office for the time stated in the first instruction, and neglected to render his accounts for the period stated in said first instruction within one month after the expiration of the said period or at any subsequent time, that then the plaintiffs are entitled to recover double the value of the postages, as certified by the said auditor to have arisen at said post-office for the preceding quarter, that is to say, from July 1st to September 30th, 1840; which said instruction was given by the court.

III. If the jury believe the facts are as set forth in the certificate of the said auditor to the statement of the said John S. Roberts's account, the said plaintiffs are entitled to recover the sum of \$2,852.72 for double postages for the period that the said Roberts neglected to render his accounts, as stated in said certificate; which said instruction was refused to be given by the court.

IV. If the jury believe from the evidence that the said

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Roberts neglected to render his accounts, as postmaster as aforesaid, as certified by the said auditor as aforesaid, then the said plaintiffs are entitled to recover the sum of \$2,018.86, being double the amount of postages certified by the said auditor to have been received at the same office for the next preceding quarter, that is to say, from the 1st of July to September 30, 1840; which said instruction was given by the court.

V. The defendants in this cause are not entitled to a credit for the amount of the receipt of \$1,731.39, executed by Robert Allen, the money mentioned in said receipt having been paid without authority, and in the violation of the instructions of the Postmaster-General; which said instruction was refused to be given by the court.

VI. The said defendants are not entitled to a credit for the said receipt of the said Robert Allen, unless the said receipt, or the duplicate thereof, was sent by next mail, or within a reasonable time after it was executed, to the Auditor of the Post-Office Department.

VII. If the said receipt, or duplicate thereof, was not sent to the Auditor of the Post-Office Department until more than a year after its execution, and until after the statement and adjustment of the accounts of the said Robert Allen, as contractor, at the Post-Office Department, as annexed to the depositions of Thomas A. Scott and Peter G. Washington, the defendants are not entitled to a credit or allowance for the said sum of money mentioned in the receipt.

*516] *Which said two last instructions were each refused to be given by the court; but the court, in answer to the first four instructions asked for by plaintiffs, charged the jury, "that the officers of the Post-Office Department had no right to calculate, as they did, that, if three months produced a given sum, four months and seven days would produce so much; that it was proper for the jury to charge the defendants with double the postage received during the quarter ending 30th September, 1840, and this for the quarter ending December 31, 1840; and, as the plaintiffs had furnished no datum for finding a verdict for the time from 1st January, 1841, to 7th February, the jury could find nothing for that period."

In answer to the fifth, sixth, and seventh instructions asked for by plaintiffs, the court further charged the jury, that if they believed, from the testimony, that the \$1,731.39 were paid to Robert Allen before the 1st of July, 1841, and he was authorized by the Department, under instructions to the postmaster, to receive it; and if they believed from the

testimony that he received no money of the United States which he was not entitled to over and above the \$1,731.39. the jury might allow a credit for it to the defendants, although the receipt is not in the form prescribed, and was not reported to the Department in conformity to the instructions, as it could work no wrong to the United States.

And the said plaintiffs, by their counsel, thereupon excepted to the opinion of the court in refusing to give the first, third, fifth, sixth, and seventh instructions, as asked for as aforesaid, and also excepted to the said charge so given by the said court to the said jury as aforesaid, and to each and every part and proposition thereof.

The court then directed the jury to state in their verdict what items and sums they should allow, and what they disallowed, in making up said verdict.

The jury then retired from the bar, and afterwards, on the same day, returned into court a verdict as follows. (The verdict has been given above.)

The United States sued out a writ of error, and brought the case up to this court.

It was argued by *Mr. Johnson* (Attorney-General), for the United States, no counsel appearing for the defendants in error.

Mr. Johnson made the following points:—

I. That the testimony of Allen, Keys, and Tomlins was improperly admitted, for the reasons set forth in the exception.

*II. That the instruction given by the judge, "that the Post-Office Department had no right to calculate as [*517 they did, that, if three months produced a given sum, four months and seven days would produce so much; that it was proper for the jury to charge the defendants with double postage received during the quarter ending 30th of September, and this for the quarter ending 31st of December, 1840; and as the plaintiffs had furnished no return for finding a verdict for the time from 1st January, 1841, to 7th February, the jury could find nothing for that period," was erroneous. Because the postage, to be doubled, instead of being limited only to the previous quarter, could have been ascertained within the meaning of the thirty-second section of the act of 1825, for the whole time claimed;—1st. By the mode adopted by the auditor; 2d. By the average of the two previous quarters, or any other two quarters; 3d. By taking the last or any other quarter, and an average of the previous quarter for the number of days necessary.

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It will be contended, that one of these modes is authorized by the law ; because, if not, the law would be wholly inoperative in the case of a default for any period short of a whole quarter.

III. That the construction of the instructions of the Postmaster-General, made under the authority of the ninth section of the act of 1836, was matter of law, and that the court should therefore have granted the fifth, sixth, and seventh instructions prayed by the plaintiffs, and should not, in answer to the said prayers, have charged the jury that, on the facts stated in the charge hypothetically, they might allow a credit of \$1,731.39.

Mr. Justice WAYNE delivered the opinion of the court.

There cannot be either security or efficiency in the business of the Post-Office Department, unless its receipts and disbursements are made upon a fixed plan. It must be executed, too, with uniformity and rigor. The duties of its officers must be definitely prescribed, and enforced without relaxation. Nor will there be either safety or justice for the country, if the forms enjoined for receiving and paying money are permitted to be disregarded by its deputies. The establishment under our system must be made to support itself.

It is extended from day to day into territories, late wildernesses, and from place to place in and beyond them, through prairies, swamps, and marshes, without any other trail than those of the first wheels that passed over them. In the settled parts of the country, new routes, changes of routes, increase of speed in conveyances, and new conveyances, are daily *demanded to meet the conveniences and the *518] wants of our almost incalculable internal commerce. Neither the cost of them nor the revenue can be anticipated. Sleepless vigilance in its chief, sleepless devotion to its business, aided by the unremitting industry and intelligence of his assistants in the Department, can only meet their responsibility, as that is estimated by public expectation.

Such is the conviction of every one who has ever had any connection with the Department, or of any one who has looked into its operations as a point of liberal inquiry. Its deputies and agents in every branch of its business see and feel the necessity of conformity to the rules prescribing their separate duties. Postmasters in the most limited offices, and contractors for the smaller or larger routes, have found that their best security for the preservation of their relations to each other and to the Department is a strict compliance with

its instructions. Several of them, acting in this spirit of subordination, have honorably connected themselves with the Department, in the estimation of the public.

Congress has legislated in such a spirit. From the beginning of its legislation to the act of March, 1825, reducing into one act all that had been previously passed, large duties were imposed upon the Postmaster-General, and there was given to him a large discretion.

If looked at in detail, it is almost remarkable that any one could be found to undertake them with the hope of discharging both acceptably. It has been done, however, and the country enjoys the benefit.

But it became necessary, from the enlargement of the business of the Department, to change its organization, and to provide a more effectual system for the settlement of its accounts. It was done by the act of 1836. By the ninth section of that act, the Postmaster-General is authorized to give instructions to postmasters for accounting and disbursing. The thirty-second section of the act of 1825 is, that if any postmaster shall neglect to render his account for one month after the time, and in the form and manner, prescribed by law, and by the Postmaster-General's instructions conformable therewith, he shall forfeit double the value of the postages which shall have arisen at the same office in any equal portion of time, previous or subsequent thereto; or in case no account shall have been rendered at the time of the trial of such case, then such sum as the court and jury shall estimate as equivalent thereto.

In this case, Roberts was the postmaster; Adams and Reed were his securities. The Postmaster-General sent to the *former instructions how he was to account, and [*519 very precise directions for paying contractors. They were the same as are sent to all postmasters, except as to the contractor to whom money was to be paid. Blank forms of orders and receipts were annexed for every collection. The order in the instructions is,—“These forms, and no others, must be used in your payments to contractors.” If the contractor called in person, no order was necessary. Two receipts, in that case, were to be kept in the form prescribed, one of which the postmaster was to keep, and the other is directed to be sent by the next mail to the Auditor for the Post-Office Department. Roberts was further instructed, that, if any other person calls for the money as the agent of the contractor, he must produce two orders in the prescribed form, signed by the contractor, with blank receipts annexed. After the agent was paid, both receipts were to be filled up

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and signed. Both were to be left with the postmaster, one of which was to be forthwith sent to the Auditor of the Department. He was told that these claims and orders could not be sold, negotiated, or transferred; that no credit would be allowed him for any payment to any other person than the contractor or the person named in his order, &c., &c., nor unless the receipt be dated on the day when the money is paid. In his official bond, among others,—and it is the first of his covenants,—he binds himself to execute the duties of his office according to law and the instructions of the Postmaster-General, and faithfully once in three months, or oftener if required, to render accounts of his receipts and expenditures as postmaster to the Post-Office Department; that he shall faithfully account, in the manner directed by the Postmaster-General, for all moneys, bills, bonds, notes, receipts, and other vouchers, which he shall receive as agent for the Department.

Thus instructed, forewarned, and bound, we can scarcely account for Mr. Roberts's disregard of his corresponding obligation otherwise than it was wilfully done. He failed to account for the time stated in the record, and he claims in this suit, as an offset against the demand of the United States, payments which he says were made to Allen, the contractor, contrary to his instructions, which the Department had not any knowledge of for two years after the date of his receipt from Allen, and for which amount Allen gave no credit when his accounts were finally settled at the Department. Such is the proof in the case. Upon the trial, when the evidence on both sides had been closed, the counsel for the United States asked that the jury might be instructed, if they believed the evidence in the case, that the defendant was liable for the *520] amount which he *said had been paid by him to Allen, and that the United States were entitled to double the amount of the postages which had accrued and had been returned as the amount from the 1st of July to the 30th of September, for the next quarter, ending on the last day of December, for which Roberts did not make a return; and at the rate for so much of the next quarter as the defendant remained in office, for which also he had failed to make a return.

In respect to the money said to have been paid to Allen, there is not a fact in the cause which can raise even a remote equity for its allowance. The facts are all the other way. There was a violation of official duty in making them, if such payments were ever really made for the purpose stated, unfairness in dealing, no credit having been given for the amount

when Allen's account was settled at the Department, and a very wrong apprehension of right by the defendant, in his claiming to be paid to him a sum for which he had subjected the United States to a loss by an inexcusable disregard of his instructions as to the manner alone in which he was permitted to pay money to a contractor. As to the double charge for postage in the account rendered against him, we think the calculation and the time for which it is made was properly done by Mr. Whittlesey, the then Auditor of the Treasury for the Post-Office Department. For the entire quarter unaccounted for, there cannot be a doubt. There ought not to be any for the portion of the next quarter. His obligation to account for and to pay both cannot be denied. It is admitted it was his duty to return for an entire quarter, under the instructions of the Postmaster-General. It is equally plain that, under the thirty-second section of the act of 1825, if a postmaster shall neglect to render his account for one month after the time, and in the form and manner, prescribed by law, he becomes liable to a double charge, according to the manner stated in that section. Then the only question is, whether that obligation to make a return is not as binding upon a postmaster who leaves office between the beginning and end of a quarter, as it is upon one who shall leave office at the end of a quarter. Is he not bound to make a return within one month after the expiration of the quarter, though he has been in office only for a part of it? By the instructions of the Postmaster-General, he ought to have done so within two days after the expiration of his quarter. Now whether the instruction or the law applies to the obligation is not material. Under the law, and without the instruction, the liability is incurred. But if the case is put under the instruction alone, we think the fair interpretation of it is, *that it com- [*521 prehends any time less than a quarter, as well as an entire quarter. This construction may be made from its terms. The postmaster is required to have the balance due by him ready to be paid on demand at the end of each quarter. He is, by the instructions, to make a return of what that amount is two days after the expiration of the quarter. If he is not ready to pay, and neglects to make his return, and says he is not bound to do either because his office terminated before the expiration of a quarter, does he not disregard the instruction as to what he had received? If his neglect to render his accounts be omitted for one month after the time, and in the form and manner, prescribed by law, it cannot be said he has not subjected himself to the penalty of a double charge, to be proportioned by what may have been received

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at his office in any equal time previous or subsequent thereto. Nor can it be said, because no account was rendered in this instance, that there was no datum for such calculation to be made, or that he was only liable to pay such an amount as a court and jury may find, upon other evidence, to be an equivalent to the penalty which he has incurred.

All of us think differently. The court below having refused to give to the jury the first, fifth, sixth, and seventh instructions which were asked by the counsel for the United States, the judgment is reversed, and the cause will be remanded for further proceedings, in compliance with the opinion now given.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Illinois, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, reversed, and that this cause be, and the same is hereby, remanded to the said Circuit Court, with directions to award a *venire facias de novo*, and for such further proceedings to be had therein as shall be in conformity to the opinion of this court, and as to law and justice shall appertain.

*522] *THE PRESIDENT AND DIRECTORS OF THE BANK OF
THE STATE OF ALABAMA, PLAINTIFF IN ERROR,
v. ROBERT H. DALTON.

A State has power to regulate the remedies by which contracts and judgments are sought to be enforced in its courts of justice, unless its regulations are controlled by the Constitution of the United States, or by laws enacted under its authority.

Therefore, where a State passed a law declaring that all judgments which had been obtained in any other State prior to the passage of the law should be barred unless suit was brought upon the judgment within two years after the passage of the act, this law was within the power of the State, and not inconsistent with the Constitution of the United States or any act of Congress.¹

¹ CITED. *Kincaid v. Richardson*, 9 Abb. (N. Y.), N. C., 319. *S. P. Meek v. Meek*, 45 Iowa, 294.

A State may, by statute, bar remedies on contracts made in other States,

and prescribe for suits thereon a shorter period than allowed upon domestic contracts. *Hawse v. Burgmire*, 4 Col., 313.

A statute reducing the time allowed

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And this was true, although the person against whom the judgment was given became a citizen of the said State upon the very day on which he was sued. The Legislature made no exception, and courts can make none.²

THIS case was brought up, by writ of error, from the District Court of the United States for the Northern District of Mississippi.

The facts were these.

On the 7th of February, 1843, the President and Directors of the Bank of the State of Alabama recovered a judgment against Robert H. Dalton, for \$1,844, with interest and costs, in the County Court of Tuscaloosa County and State of Alabama.

On the 24th of February, 1844, the State of Mississippi passed an act (Hutchinson's Mississippi Code, pp. 830 *et seq.*), which provided, amongst other things, that judgments rendered before the passage of the act in any other State of the Union should be barred, unless suit was brought thereon within two years from the passage of the act.

On the 10th of November, 1846, the President and Directors of the Bank of the State of Alabama brought a suit against Dalton in the District Court of the United States for the Northern District of Mississippi, held at the town of Pontotoc. It was an action of debt brought upon the judgment recovered in the County Court of Tuscaloosa County, in Alabama. The writ was served upon Dalton on the same day that it was issued. The defendant pleaded the statute of limitations of Mississippi in the following manner:—

“And the said defendant, by his attorneys, comes and de-

by a previous statute of limitations, in which to begin a certain class of actions, is not unconstitutional, even when applied to demands then already accrued, provided reasonable time is allowed for putting them in suit. *Terry v. Anderson*, 5 Otto, 628; *People v. Wayne Circuit Judge*, 37 Mich., 287; *Krone v. Krone*, Id., 308; *Guillotel v. Mayor &c. of New York*, 55 How., (N. Y.) Pr., 114.

A Texas statute provided that no action should be brought on a foreign judgment of four years' standing and upward, unless brought within sixty days. *Held*, a valid law. *Bacon et al. v. Howard*, 20 How., 22.

A State statute provided that “no action shall be maintained on any judgment or decree rendered by any court without this State against

any person who, at the time of the commencement of the action in which such judgment or decree was or shall be rendered, was or shall be a resident of this State, in any case where the cause of action would have been barred by any act of limitation of this State, if such suit had been brought therein.” *Held*, unconstitutional, as in conflict with U. S. Const., Art. IV., § 1, which provides that “full faith and credit shall be given in each State to the . . . judicial proceedings of every other State.” *Christmas v. Russell*, 5 Wall., 290.

See also notes to *Brabston v. Gibson*, *ante*, *263; and to *Townsend v. Jemison*, *ante*, *407.

² COMMENTED ON. *Hanger v. Abbott*, 6 Wall., 542. CITED. *Bickel v. Chisman*, 70 Va., 688.

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fends the wrong and injury, when, &c., and for plea says, that the said plaintiff his action aforesaid ought not to have or maintain against him, because he says that the said judgment upon which this suit is founded was obtained in a court out of the limits of the State of Mississippi, to wit, the County Court of the County of Tuscaloosa, in the State of Alabama, and was rendered up against said defendant on the *523] 7th day of *February, 1843, and was then and there, on that day, in full force and effect in said court.

"And defendant further says, that by an act of the Legislature of the State of Mississippi, entitled 'An act to amend the several acts of limitations,' approved on the 24th day of February, 1844, it is enacted and declared, upon judgments obtained in any court out of the limits of this State, actions shall be commenced within two years after the passage of the said act, and not afterwards; and that this action was not commenced by this plaintiff until the two years had expired, within which the said plaintiff was required to bring his suit as aforesaid, and this he is ready to verify; wherefore he prays judgment, if the said plaintiff ought to have or maintain his aforesaid action against him," &c.

To this plea the plaintiff filed the following replication:—

"And the said plaintiff, for replication to the pleas of the said defendant by him first above pleaded, says *precludi non*, because he says that the said defendant, at and from the time of the rendition of the judgment in said plea and declaration mentioned, and from thence until and within two years next before the commencement of this suit, to wit, on the 10th day of November, A. D., 1846, to wit, at the district aforesaid, was and continued to be a citizen of the State of Alabama, where the said plaintiff resided, without the jurisdiction of this court; and this they pray may be inquired of by the country," &c.

The defendant demurred to this replication, and, upon argument, the court sustained the demurrer.

To review this judgment, the bank brought the case up to this court.

It was submitted on printed arguments by *Mr. Featherston*, for the plaintiff in error, and *Mr. Adams*, for the defendant in error. The arguments are very short, and may be inserted.

Mr. Featherston, for the plaintiff in error.

This action of debt was brought by the plaintiff to recover of the defendant the sum of \$1,844 debt, and \$110.58 damages, the amount of a recovery had in the Circuit Court of

Tuscaloosa County and State of Alabama, on the 7th day of February, 1843, by the plaintiff against the defendant. This suit was instituted in the District Court of the United States for North Mississippi, at Pontotoc, at the December term thereof, 1846. The writ was issued on the 10th day of November, 1846. The defendant at the said December term, 1846, pleaded the statute of limitations of 1844, which provides that no suit *shall thereafter be instituted in this State upon any judgment rendered in any other State [*524 of this Union, unless the same be done within two years after its rendition. To this plea of the statute of limitations the plaintiff replied, that, at the time of the rendition of the judgment in Alabama, the defendant was a citizen of the State of Alabama, and continued so to be up to the 10th day of November, 1846, the day on which this suit was brought. To this replication there was a demurrer by the defendant, which the court sustained, upon the ground that the statute barred the action, although the defendant was a non-resident, and beyond the jurisdiction of this State up to the moment of its institution. It is difficult to apprehend how this decision can be law, and how it can be reconciled with the hundred and one decisions made by every court in every State in the Union. That no one can avail himself of the presumptions that the statute of limitations raises in favor of his having paid his debt, but a citizen of the State where the suit is brought, and that the statute does not commence running until the party gets into the State, are propositions so often decided, and so universally recognized, that it is not believed defendant's counsel was serious when he first made the defence so successfully set up by him to this action. To suppose the Legislature of the State of Mississippi intended to pass a law closing her courts against debts due between citizens of other States before they should come within her jurisdiction, is preposterous; that she could have permitted her sovereignty to become vindictive and malignant against a particular class of claims, and allowed it, in its petulance, to enact, that hereafter Mississippi should be a State of refuge for judgment debtors, and leave general creditors to the general statute law, I cannot believe; but if the decision made in this case is law, she, the State of Mississippi, has done that thing. If the construction given to the statute in this case be correct, then debtors of other States are encouraged to dishonesty, and invited to flee from their debts. This act was passed in February, 1844, and commenced running from its approval; the defendant was then a citizen of the State of Alabama, where he continued until, according to the

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decision in this case, the judgment, the foundation of this action, was positively barred ; although neither plaintiff nor defendant was within the jurisdiction of the courts of the State, or entitled to peculiar favors from Mississippi, from having rendered her any great public services. The replication shows that the defendant did not come within the jurisdiction of the State courts until the 10th of November, 1846, over two years from the passage of the act of 1844. But suppose *the court should think that the bar of the statute
*525] became complete at the end of two years. Still, in the construction of the act of 1844, they will take it in connection with all the other acts of limitation of the State, and make them harmonize if possible. Now, the act of 1822 declares, that the time of the absence of the debtor from the State, he being a citizen, shall be deducted in the computation of the time. There can be no inconsistency, then, in deducting the absent time in this case ; let this be done, and the court will see that the suit was instituted on the very day he came into the State.

Mr. Adams, for the defendant in error.

The question presented by the plea, replication, and demurrer is, Does the fourteenth section of an act of the Legislature of the State of Mississippi, entitled "An act to amend the several acts of limitations," approved February 24th, 1844, apply to foreigners, or citizens of other States, sued within the limits of the State of Mississippi?

No question is raised as to the constitutionality of the act itself, that point having been so fully settled, upon a similar statute, by the Supreme Court of the United States, in *McElmoyle v. Cohen*, 13 Pet., 314. The High Court of Errors and Appeals of Mississippi have also enforced it in *McClintock v. Rogers*, 12 Sm. & M., 702.

One of the first English cases in which this point arose was in the construction of the statute of 21 James I., where Lord Keeper Cowper uses this language : "The statute provides that, where the party plaintiff, he who carries the action about him, goes beyond sea, his right shall be saved, but where the debtor or party defendant goes beyond sea, there is no saving in that case. It is plausible and reasonable that the statute of limitations should not take place, nor the six years be running, until the parties come within the cognizance of the laws of England, but that must be left to the legislature."

In the case of *Beckford and others v. Wade*, 17 Ves., 88, *et seq.*, this question is fully examined, and the same conclu-

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sion arrived at by Sir Wm. Grant, then Master of the Rolls, to whose elaborate and able opinion the court is respectfully referred.

In *Ruggles v. Keeler*, 3 Johns. (N. Y.), 263, Chancellor Kent expresses the same opinion.

In *McIver et al., Lessees, v. Ragan*, 2 Wheat., 25, which was admitted to be a case within the act of limitations of the State of Tennessee, and not within the letter of the exceptions, Chief Justice Marshall says,—“Wherever the situation of a party *was such as, in the opinion of the legislature, to furnish a motive for excepting him from the [*526 operation of the law, the legislature has made the exception. It would be going far for this court to add to those exceptions.”

And again he adds,—“If this difficulty be produced by the legislative power, the same power might provide a remedy, but courts cannot on that account insert in the statute of limitations an exception which the statute does not contain.” See also *Cocke and Jack v. McGinnis*, Mart. & Y. (Tenn.), 361; *Patton v. McClure*, Id., 332; 2 Yerg. (Tenn.), 290.

Applying these principles to the case before us, there can be no doubt that the District Court ruled correctly in sustaining the demurrer to plaintiff's replication. The act of limitations of the State of Mississippi may be found in the Pamphlet Acts of 1844, p. 101, and in Hutchinson's Mississippi Code, p. 830, *et seq.*

The first ten sections of this act define the bar of the statute in the cases therein enumerated. The eleventh section then provides, that, so far as the ten preceding sections are concerned, suit may be commenced against a party out of the State after his return, and that the time of his absence shall be deducted, &c. This expressly applies, however, only to those sections that precede it. In *Ruggles v. Keeler*, 3 Johns. (N. Y.), 263, before referred to, the court say this applies to foreigners as well as citizens, because the statute makes it so. But no such principle applies to the subsequent sections of the act, and certainly, if the legislature had thought it right as to those sections, or intended it to apply to them, it would have so enacted.

The seventeenth section expressly provides that, in the construction of this act, no cumulative or additional disabilities shall be added, allowed, &c.

The eighteenth section provides, that the periods of limitations established by this act shall commence running from the date of the passage thereof, and repeals all acts and parts of

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acts conflicting with and contrary to the provisions of this act.

And the nineteenth section enacts that the act shall take effect from its passage. As the act therefore is express in its terms, that no suit shall be commenced upon a foreign judgment unless within two years from its passage, as no exceptions are contained in the act, and by the act they are expressly excluded, the District Court could not have done otherwise than sustain the demurrer to plaintiff's replication.

Mr. Justice CATRON delivered the opinion of the court.

An action was brought by the plaintiff to recover of the *527] *defendant, then a citizen of Mississippi, the sum of \$1,844 debt, and \$110 damages, the amount of a recovery had in the Circuit Court of Tuscaloosa County, and State of Alabama, on the 7th day of February, 1843, by the plaintiff against the defendant. This suit was instituted in the District Court of the United States for the Northern District of Mississippi, at Pontotoc. The writ was issued on the 10th day of November, 1846. The defendant, at the December Term, 1846, pleaded the statute of limitations of 1844, which bars (1.) all suits on judgments recovered within the State after the lapse of seven years; and (2.) all suits on judgments obtained out of the State in six years, in cases of judgments thereafter rendered; and (3.) all suits on judgments obtained out of the State before the act was passed are barred, unless suit be brought thereon within two years next after the date of the act. On this latter provision the defence depends.

To this plea of the statute of limitations the plaintiff replied, that at the time of the rendition of the judgment in Alabama, the defendant was a citizen of the State of Alabama, and continued so to be up to the 10th of November, 1846, the day on which this suit was brought. To this replication there was a demurrer by the defendant, which the court sustained, upon the ground that the statute barred the action.

It would seem that the defendant removed his domicile from Alabama to Mississippi, and was followed by the judgment, and immediately sued on reaching there, as he does not call in question the allegation contained in the declaration that he was, when sued, a citizen of Mississippi.

The stringency of the case is, that the act of limitations of Mississippi invites to the State and protects absconding debtors from other States, by refusing the creditor a remedy on his judgment, which is in full force in the State whence the

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debtor absconded. And it is insisted, on behalf of the plaintiff, that here is a case where the laws of Mississippi did not operate on either party (plaintiff or defendant), nor on the foreign judgment, until the day on which suit was brought, and that therefore no bar could be interposed founded on the lapse of time, as none had intervened.

That acts of limitation furnish rules of decision, and are equally binding on the Federal courts as they are on State courts, is not open to controversy; the question presented is one of legislative power, and not practice.

In administering justice to enforce contracts and judgments, the States of this Union act independently of each other, and their courts are governed by the laws and municipal regulations *of that State where a remedy is sought, unless [528 they are controlled by the Constitution of the United States, or by laws enacted under its authority. And one question standing in advance of others is, whether the courts of Mississippi stood thus controlled, and were bound to reject the defence set up under the State law, because, by the supreme laws of the Union, it could not be allowed.

The Constitution declares, that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every State. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." No other part of the Constitution bears on the subject.¹

The act of 26th May, 1790, provides the mode of authentication, and then declares, that "the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from whence the said records are or shall be taken."

The legislation of Congress amounts to this,—that the judgment of another State shall be record evidence of the demand, and that the defendant, when sued on the judgment, cannot go behind it and controvert the contract, or other cause of action, on which the judgment is founded; that it is evidence of an established demand, which, standing alone, is conclusive between the parties to it. This is the whole extent to which Congress has gone. As to what further "effect" Congress may give to judgments rendered in one State and sued on in another does not belong to this inquiry; we have to deal with the law as we find it, and not with the extent of power Congress may have to legislate further in this respect. That the

¹ See *United States v. Reese et al.*, 2 Otto, 251.

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legislation of Congress, so far as it has gone, does not prevent a State from passing acts of limitation to bar suits on judgments rendered in another State, is the settled doctrine of this court. It was established, on mature consideration, in the case of *McElmoyle v. Cohen*, 13 Pet., 312, and to the reasons given in support of this conclusion we refer.

But the argument here is, that the law of Mississippi carries with it an exception, for the palpable reason that neither party nor the cause of action was within the operation of the act for a single day before suit was brought.

1. The act itself makes no exception in favor of a party suing under the circumstances of these plaintiffs. So the Supreme Court of Mississippi held in the case of *McClintock v. Rogers*, 12 Sm. & M. (Miss.), 702; and this is manifestly true on the face of the act.

*529] *2. The legislature having made no exception, the courts of justice can make none, as this would be legislating. In the language of this court in the case of *McIver v. Ragan*, 2 Wheat., 29, "Wherever the situation of the party was such as, in the opinion of the legislature, to furnish a motive for excepting him from the operation of the law, the legislature has made the exception, and it would be going far for this court to add to those exceptions." The rule is established beyond controversy. It was so held by the Supreme Court of New York in *Troup v. Smith*, 20 Johns. (N. Y.), 33; and again in *Callis v. Waddy*, 2 Munf. (Va.), 511, by the Court of Appeals of Virginia; and also in *Hamilton v. Smith*, 3 Murph. (N. C.), 115, by the Supreme Court of North Carolina; and in *Cocke and Jack v. McGinnis*, Mart. & Y. (Tenn.), 361, in the Supreme Court of Tennessee. Nor are we aware that, at this time, the reverse is held in any State of this Union. It is the doctrine maintained in *Stowell v. Zouch*, found in Plowd. Reports, and not departed from by the English courts, even in cases of civil war, when the courts of justice were closed and no suit could be brought.

In the first place, as the act of limitations of Mississippi has no exception that the plaintiff can set up, and as none can be implied by the courts of justice; and secondly, as the State law is not opposed to the Constitution of the United States or to the act of Congress of 1790, it is our duty to affirm the judgment.

The case of *Dulles, Wilcox, and Welsh* against *Richard S. Jones* (No. 108), being in all its features like the one next above, the judgment therein is also affirmed, for the reasons stated in the foregoing opinion.

Bayard v. Lombard et al.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Mississippi, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed, with costs.

*JOSEPH H. DULLES, EDWARD WILCOX, AND JOHN WELSH, PLAINTIFFS IN ERROR, v. RICHARD S. JONES. [*530]

THIS case was brought up, by writ of error, from the District Court for the Northern District of Mississippi.

In its main features it was similar to the preceding case of *The Bank of the State of Alabama v. Dalton*, and it will be perceived, by a reference to the concluding sentence of the opinion of the court in that case, that it included the present. No further report need, therefore, be made of it.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Mississippi, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed, with costs.

HENRY M. BAYARD, PLAINTIFF IN ERROR, v. ISREAL LOMBARD AND CHARLES O. WHITMORE.

Where land was sold under an execution, and the money arising therefrom about to be distributed amongst creditors by an order of the Circuit Court, a controversy between the creditors as to the priority of their respective judgments cannot be brought to this court, either by appeal or writ of error. Although the State in which the judgment was given allowed appeals, by statute, in similar cases arising in the courts of the State, yet it does not follow from the adoption of the forms of process in execution that the

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courts of the United States adopted the modes of reviewing the decisions of inferior courts.¹

An appeal to this court is given in chancery cases alone.

Nor is the case a proper one for a writ of error. Such a writ cannot be sued out by persons who are not parties to the record, in a matter arising after execution, by strangers to the judgment and proceedings, and where the error assigned is in an order of the court disposing of certain funds in their possession accidentally connected with the record.²

The creditors should have filed their bill in equity, or stated an issue in due legal form, with proper parties, setting forth the merits of their respective claims, in order to lay the foundation for an appeal or writ of error to this court.³

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the Eastern District of Pennsylvania.

On the 25th of July, 1845, a judgment was entered on a bond and warrant of attorney, given by Henry M. Bayard to Israel Lombard and Charles O. Whitmore, in the Circuit Court of the United States for the Eastern District of Pennsylvania, *upon which a writ of *feri facias* was issued, *531] returnable to April session, 1846, which was returned by the marshal for that district as levied on certain tracts of land, the property of the said Henry M. Bayard, in the County of Lancaster, in said district, and which were condemned by the inquisition returned with said writ as not of a clear yearly value beyond all reprises sufficient within the space of seven years to satisfy the debt and damages in the said writ mentioned.

A writ of *venditioni exponas* was issued, returnable to April session, 1847, upon which the said tracts of land were sold to Ann Caroline Bayard for the sum of \$61,200; of which the sum of \$60,333 80, being the net amount, after deducting commissions and costs, was agreed to be considered as paid into court.

Upon a motion made on behalf of the Dauphin Deposit Bank, to take out of court the amount of the judgment recovered, on the 28th of August, 1845, by the said bank against the said Henry M. Bayard, in the District Court for the County of Lancaster, for \$2,500, James Hepburn, Esquire, was appointed by the court, on the 7th of June, 1847, auditor, to report who are entitled to the moneys so considered as in court, who, on the 20th of September, 1847, filed his report, which directed that the judgments against the said Henry M. Bayard be paid according to their priority, without regard to the court in which they were recovered.

¹ See *Brown v. Pierce*, 7 Wall., 217. *Bayne*, 18 How., 62.

² CITED. *Curtis et al. v. Petitplain* ³ CITED. *Wickham v. Morehouse*, 16 at al., 18 How., 110. See *Graham v. Fed. Rep.*, 325.

As this report examines a point of great interest to the profession throughout the United States, namely, the extent of the lien upon real estate which is created by a judgment in the Circuit Courts of the United States, and as the report was confirmed by the Circuit Court of the Eastern District of Pennsylvania, it is thought proper to insert it.

“To the Honorable, the Judges of the Circuit Court of the United States for the Eastern District of Pennsylvania.

“The undersigned, the auditor appointed by your honorable court, as per certificate annexed, marked A, with instructions to report who are entitled to the moneys in the said certificate mentioned, as being in court, by the agreement of the parties claiming the same, secured by a sale of the property of the defendant, situated in Lancaster County, Pennsylvania, by an execution directed to the marshal of this district, in the suit of *Lombard and Whitmore v. Henry M. Bayard*, in this court, respectfully reports:—

“That he gave notice to all persons interested in the matter referred to him, by advertisements published for three weeks in the ‘Democratic Union’ at Harrisburg, and in the ‘Pennsylvanian’ at Philadelphia, as directed by the order of court, stated in the said certificate, and as [*532 will appear from schedule B, hereto annexed; and that he was attended at the time and place in the said advertisements mentioned, and at the several adjournments of the case, by John M. Read, Esq., who appeared for Lombard and Whitmore, for the use of Haldeman and McCormick; C. B. Penrose, Esq., who appeared for the Middletown Bank; Calvin Blythe, Esq., and W. Harris, Esq., who appeared for the Dauphin Deposit Bank, William H. Rawle and William Rawle, Esquires, who appeared for R. H. Bayard; and Mr. Wilson, President of the Farmers’ Bank of the State of Delaware, who attended on behalf of the said bank.

“The execution above mentioned issued from this court in this case of *Lombard and Whitmore v. Henry M. Bayard*, whose real estate in Lancaster County was levied upon and sold by the marshal of this district to Ann Caroline Bayard, on the 9th day of April, 1847, for the sum of \$61,200, subject to a mortgage of \$18,000, the marshal’s deed to which was acknowledged to the purchaser on the 15th day of April, 1847; and the sum of \$61,200, the said purchase-money, is the sum considered in court, and mentioned in the said certificate marked A, and is the subject of reference to the undersigned.

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"A list of the judgments hereto annexed, marked C, will exhibit the several claims upon the fund, which are stated in the said list in the order of their dates respectively. The question for examination respects the liens of these judgments; and if the judgments in this court are liens upon the lands of the defendant situated in Lancaster County at the time of the sale, then the judgments are to be paid in the order of their dates, as stated in the list; but if the judgments of this court are not liens on the said lands, then the judgments of Richard H. Bayard, of January 20, 1844, and those of Lombard and Whitmore, of July 25, 1845, and July 29, 1845, are to be postponed as to the fund for distribution.

"The case was submitted to the auditor without argument; and having to depend upon his own research in ascertaining the law involved in the subject of inquiry, the defects that may be apparent in the view of the case now about to be submitted may be the more readily accounted for.

"It would seem that the lien of judgments on the real estate of defendants, obtained in the courts of the United States, was for a long time the subject of doubt. The first case, in point of date, that I have met with, is that of *Konig v. Bayard*, October term, 1829, 2 Paine, decided in the Circuit Court of the United States for the Southern District of *583] New York. In *that case, it was held that the judgment created a lien upon the lands of the defendant, from the time it was docketed, according to the rule in the State courts; and that the lands of a debtor were liable to be taken in execution after they had passed into the hands of a *bona fide* purchaser, by a conveyance subsequent to the judgment, and prior to the issuing of the execution; and the principles upon which the judge founded his opinion may have weight in the present case.

"It was held, 'that the liability of lands to execution in the courts of the United States does not arise from any act of Congress expressly making them so liable, but from the operation of the process acts of 1789 and 1792; the State law upon the subject, being thereby adopted, should be considered as also adopting the effect and operation of the judgment as a lien. The repeated decisions in the courts of the United States, although they have not directly decided the point, had proceeded upon the presumption, that the lien created by a judgment in the United States courts upon land, and the mode of proceeding to obtain satisfaction of the judgments, are regulated entirely by the State laws. That Congress, by the process act, adopted both the form and

effect of executions as established by the State laws in 1789. That their form and effect in this State [New York] depended upon the State act of 1787, which requires the sheriff to take the goods and chattels of the defendant, and, if sufficient cannot be found, then to make the debt and damages out of the land, &c., whereof the defendant was seized on the day on which such lands become liable to such debt. That the execution thereupon extends to, and operates upon, the lands of which the defendant was seized on that day; and that this was its effect, which had been adopted by the process act.'

"The next case, in point of time, that I have met with, is that of *Tayloe v. Thompson*, in the Supreme Court of the United States, 5 Pet., 35, decided in a case taken up under the laws of Maryland. It was contended for the plaintiff in error, that no statute of Maryland authorized the sale of lands for debt, and that the statute of 5 George II., antecedent to the Revolution, was the only legislation upon the subject. That that statute rendered lands in the Colonies subject to execution as chattels, and this only in favor of British merchants; and no execution having issued upon the lands in question before the title to them passed to the plaintiffs, consequently, as in the case of chattels, no lien attached upon the judgment.

"The court, in delivering their opinion, said,—'This statute (5 Geo. II.) has been adopted and in use in Maryland ever *since its passage, as the only one under which [*534] lands have been taken in execution and sold. It has long received an equitable construction, applying it to all judgment creditors. As Congress has made no law on this subject, the Circuit Court were bound to decide the case according to the law of Maryland; which does not consist merely in enactments of their own, or the statutes of England in force or adopted by their legislation. The adjudication of their courts, the settled, uniform practice and usage of the State, in the practical operation of its provisions, evidencing the judicial construction of its terms, are to be considered as part of the statute, and as such furnishing a rule for the decision of the Federal courts. The statute, and its interpretations, form together a rule of title and property, which must be the same in all courts. It is enough for this court to know that, by established usage, the statute (5 Geo. II.) has been acted on and considered as applying to all judgments in favor of any person; and that sales made under them have been held valid as titles. Though the statute does not provide that the judgment shall be a lien from the

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time of its rendition, yet there is abundant evidence that it has always been so considered, and so acted on.' And the judge concludes by saying, that there was 'no doubt that the courts of Maryland had decided it as a rule of property from the earliest period, that a judgment is a lien *per se* on the lands of the defendant.' And, therefore, the lien of the judgment in the Circuit Court was sustained from the date of its rendition.

"In the case of the *Manhattan Company v. Evertson*, 6 Paige, 465, the question that bore upon the doctrine of lien depended upon the question, whether a judgment in the United States Circuit Court for the Southern District of New York was a lien upon lands lying within the Northern District of the same State; and in delivering his opinion the Chancellor says,—'There is no act of Congress making a judgment in a court of the United States a lien on lands, either within the general territorial jurisdiction of the court, or elsewhere. The existence of such a lien must therefore depend upon the local law of the State where the land is situated upon which such a lien is claimed.

"By the common law, a freehold could not be reached by a judgment, except in the case of an heir, upon a judgment bond, or other specialty. The statute of 13 Edw I., which gave the writ of elegit, by which one half of the land of the judgment debtor might be taken in extent, did not, in terms, create a lien, so as to prevent a sale by the debtor before execution; but the uniform construction of the statute has been, to give such a lien, from the entry of the judgment, upon the lands *which could be reached by the process of the court. *535] And when the British statute of 5 George II., ch. 7, subjected lands in the Colonies to sale on execution, the same principle was adopted in the Colony of New York, and in most of the Colonies, as to the lien of the judgment upon real estate which might be thus sold; and this lien was held to extend to all freehold lands which could be reached by an execution out of the court in which the judgment was entered. And when a judgment was removed from an inferior into the Supreme Court, and there affirmed, such judgment became a lien upon all lands of the debtor throughout the State, from the time of the docketing of the judgment in the Supreme Court. Such was the state of the law here [New York] at the time of the Revolution.

"The act of 1787, which was substituted in the place of the British statute subjecting lands to execution, recognizes the existence of such lien in the form of the execution which is directed by the statute to be issued against the lands of the debtor, as the sheriff is directed, in case the personal estate

is insufficient to pay the judgment and costs, to levy the same on the lands and tenements whereof the judgment debtor was seized on the day the lands become liable, or at any time afterwards.

“ ‘And that a judgment of a court of the United States is a lien upon the real estate of the debtor, in accordance with the local law of the place where the land lies, is settled by the Supreme Court. 5 Pet., 358.

“ ‘Upon the principle which has been adopted by Congress, and by the Supreme Court of the United States, the legal effect of a judgment as a lien upon the real estate of a defendant, whether such judgment is rendered in a court of the State or in a Federal court, where no direction on the subject has been given by the sectional legislature, must necessarily be governed by the local law, although the mode of proceeding to enforce such lien, where it exists, may not be the same in the courts of the State and Federal courts. I have no doubt, therefore, that the lien of a judgment recovered in one of the Circuit or District Courts of the United States, within the limits of this State, is a lien upon the lands of the debtor lying within the territorial jurisdiction of such court, for the term of ten years from the docketing of such judgment, in the same manner that a judgment of a court of record in one of the State courts is a lien.

“ ‘And the only difficulty is in determining whether the lien, according to the true principle of the local law, extends to all lands which may be reached by the execution of the court, *or only to such as are within [*536 the territorial jurisdiction to which the original process of such court extends.’ And the Chancellor concluded by saying, ‘but with some hesitation, that a judgment recovered in the Circuit Court, in either of the districts, is a lien upon real property lying in any part of the State within which the Circuit Court is held.’ And he added, that, if a county court were authorized to issue execution throughout the State, the principle of the local law would extend the liens of the judgments thereafter recovered throughout the State; that such was the construction of Virginia, permitting execution upon a judgment in a local court to be issued to other counties; and cited 2 McCall, 186.

“ ‘In the case of *Konig v. Bayard*, heretofore referred to, the same doctrine is held, that the lien of a judgment upon the lands of a defendant existed by virtue of the right to take it in execution and sell it in satisfaction of the debt.

“ ‘The case of the *United States v. Morrison*, 4 Pet., 124, was taken up to the Supreme Court of the United States by

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appeal from the Circuit Court for the Eastern District of Virginia. The Chief Justice, in delivering the opinion, says, —‘In Virginia there is no statute which, in express terms, creates a lien upon the lands of the debtor. As in England, the lien is a consequence of the right to take out an *elegit*. Different opinions seem to have been entertained of the effect of any suspension of the right. By the construction of the Circuit Court, the party who sued out a *fi. fa.* could not resort to an *elegit* until the remedy on the *fi. fa.* was shown by the return to be exhausted’; that is, that the lien was suspended until the return of the *fi. fa.*, and the adverse right, having attached in the mean time, was preferred to that claimed under the judgment.

“But soon after the judgment in the Circuit Court, and before the case came up to be heard in the Supreme Court, the Court of Appeals of the State decided that the right to take out an *elegit* was not suspended by suing out a *fi. fa.*, and consequently, that the lien of the judgment was continued pending the proceedings on that writ. And upon the ground of this decision of the Court of Appeals, establishing the law of the State, the judgment of the Circuit Court was reversed, and the cause remanded; the Chief Justice observing, that ‘this court, according to its uniform course, adopts that construction of the act which is made by the highest court of the State.’

“The above case recognizes the position, that where a lien is dependent upon the right to issue execution, and that right is suspended, the lien is suspended also; and is remarkable for the strong expressions used by the Chief Justice, in reference *to the deference paid by the courts of the United *537] States to State laws.

“The Supreme Court, in the case of *Tayloe v. Thompson*, rather assign the local law of the State, recognized in its highest tribunals, establishing the lien of judgments, without special regard to the reasons by which it became established, as the ground of their decisions; and in that case the judgment is held to be a lien *per se*.

“And in 4 Pet., 366, the Supreme Court have held, that in Kentucky a judgment does not bind land; that the lien attaches only from the delivery of the execution to the sheriff; and in that State, therefore, the right to issue execution does not carry with it a lien upon lands.

“In Ohio, the lien of a judgment is lost, if execution is not sued out and levied within a year from its rendition.

“In Tennessee, a judgment of a county court is a lien, for one year after its rendition, on defendant’s lands throughout

the State, and prior judgments take precedence of executions. Mart. & Y., 26.

"Judgments in the Circuit Court of the United States, in the State of Ohio, rendered previous to May, 1828, attached as liens upon the lands of defendant throughout the State, in virtue of the adoption by that court of the execution laws of the State in the regulation of its practice. *Sellers v. Corwin*, 5 Ohio, 398.

"Here are presented a variety of local laws of different States on the subject of the lien of judgments, some derived from one principle and some from another; and it may be remarked, that the statute of George II., the construction of which by the State courts of New York is the ground of the Chancellor's opinion above quoted, could have no application to any State formed since the Revolution, and after the States were colonies of Great Britain, to whom in that relation alone it applied. But hence the strong propriety of a broader ground of decision, on the part of the Federal courts, to adapt their proceedings to the local laws; and this is comprehended in the view of the Supreme Court, taking the established law of the State as the basis of their judgments in matters of local character. And this ground of decision embraces all States, whatever may be the date of their creation or the peculiarity of their laws; and this, I conceive, is the ground taken in the case of *Tayloe v. Thompson*, before referred to.

"It is not, however, deemed material in this case whether one principle or the other be adopted, as either will lead, it is believed, to the same conclusion, in accordance with the local laws of Pennsylvania.

*"Antecedent to the act of the Pennsylvania Legislature of 1799, a judgment in the Supreme Court of [*538 the State was held to bind the lands of the defendant throughout the State; and the powers of the Supreme Court were held to be the same as those of the Court of King's Bench in England; and that, the liens of judgments in the latter court being only bounded by its territorial jurisdiction, those of the former had equal extent. That act, however, provided that no judgment of the Supreme or Circuit Court of the State should be a lien on real estate, excepting in the county in which such judgment should be rendered. *Purd. Dig.*, 432.

"This is the only act of the Pennsylvania Legislature fixing territorial limits to the lien of judgments.

"There are several acts familiar to every one, fixing limits as to time, which, it is conceived, have no bearing on this case, and which, therefore, call for no special notice. The

act of 1798, however, limiting the lien of judgments to five years, unless revived by *scire facias*, having been considered in this court, and the general argument having, as it is deemed, a bearing upon the question under discussion, will be presently noticed.

"The general doctrine of the lien of judgments has, however, been considered in the case of *Krause's Appeal*, 2 Whart. (Pa.), 402, in the Supreme Court of this State. In that case the court say, that 'neither the act of Parliament, which subjected lands, *sub modo*, to the payment of debts, nor our acts of 1700 and 1705, which made them liable to be sold absolutely, expressly provided that a judgment should be a lien on land. In both countries, however, it was held to bind land. Both there and here, it is expressly assumed by the legislatures of the different countries, and the time when the lien is to commence, and how long it is to continue, and by what proceeding prolonged, are expressly provided by different laws,' &c. We may content ourselves with saying, that a judgment is in Pennsylvania a lien on real estate, by acts of Assembly, and the nature and extent of the lien are according to the provisions of these enactments.

"In the case of *Thompson v. Phillips*, 1 Baldw., 273, one of the questions considered by the Circuit Court was, whether the State law of 1798, limiting the lien of judgments on real estate to five years, was obligatory upon the Federal courts, and it was held that it was, for a variety of reasons. 'The terms of the act,' it was said, 'extend to all judgments,' in any court of record, 'within this State, and are broad enough to take in those of this court. Its object is declared to be to *589] prevent the risk and inconvenience to purchasers of real estate, by suffering judgments to remain a lien for an indifferent time, without any process to continue or revive the same, which applies in whatever courts such judgments are rendered. We cannot consider it as a mere process act; it is a part of a great system of jurisprudence, for the safety and protection of purchasers, &c. The questions arising under it are those of property, title, and the rights of purchasers for a valuable consideration. It cannot be doubted that this law should be the rule of decision in a State court, and it is difficult to perceive a reason why a different rule should be adopted in this court, merely because the plaintiff, being a citizen of another State, may bring his suit here or in the State courts, at his option. Both the courts administer the laws and jurisprudence of the State; the rules of property and title are the same, as well as the modes of transmission by judicial process; all regulated by State laws, there ought to

be one uniform course of adjudication upon them.' 'That over the subject-matter Congress possesses no constitutional jurisdiction, nor has, in any manner, assumed its exercise. These are subjects of internal police and State regulation, over which the States have delegated no power to the general government; on which the States can legislate to any extent, and in any manner not prohibited by the constitution of the State or the Union.' And the judge affirmed that the case came strictly within the thirty-fourth section of the Judiciary Act.

"Although the argument of the court in the above case is applied to a question of limitation as to time, yet it is apprehended that its general doctrines are as applicable to a limitation in reference to territory as to that of time. A restriction imposed upon the lien of a judgment as to territory would enter as fully into questions of property, title, and the rights of purchasers, as that of a restriction as to the period of its duration; and therefore, if the local law is the rule of decision in the one case in the Federal courts, no reason is perceived why it should not be in the other.

"But a State legislature can impose no rule upon a Federal court, directly or indirectly, that cannot be sustained by the Constitution of the United States. Such legislatures have full power over their own tribunals, where it is not controlled by the State constitution, and they may enact what rules they please for their government within this limit; and if they were to abolish liens on real estate altogether, obtained through the medium of judgments, I apprehended the United States courts, in accordance with the doctrines of the cases quoted, would be *bound by it. But if a State were to restrict [*540 the liens of all judgments obtained in courts of record to the counties in which they were recovered, it might well be doubted if the Federal courts would be bound by such enactment, literally construed; for, in that case, the lien of a judgment in these courts would be excluded from every county composing the district except that in which the court might be located. This, therefore, would form a different rule for the Federal courts from that which would operate upon the State courts. The rule in the supposed case, it may be observed, can have no reference to locality, as distinct from the jurisdiction intended to be acted upon, and the term *county*, used in this connection, would be deemed merely a word used to designate the known limits of a given jurisdiction, and would, by applying the rule instead of a particular word to the Federal courts, embrace the district. If such would not be the construction, there would be no uniformity

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of decision between the Federal courts and those of the State, and the evils pointed out in the case in 1 Baldw., 278, as likely to arise out of a collision between the State and Federal tribunals would be without remedy. The State laws cannot be made to have any special and direct bearing upon the United States tribunals. The latter merely administer the laws of the State as they find them, and because they are the laws of the State; but a law that would operate upon a Federal court exclusively, so as to restrain its action or the efficacy of its judgments beyond the restraints imposed upon the State courts, could scarcely be called a State law; and it might well be doubted if there would be any obligation upon the Federal courts, either under the thirty-fourth section of the Judiciary Act, or any acknowledged principle, to observe its provisions. This is, however, supposing a difficulty that does not exist.

“But it appears that Congress has legislated upon the subject of liens, so far as to designate the period when liens on judgments shall cease. By the act of July, 1840, c. 20, § 4, it is provided, ‘That judgments and decrees thereafter rendered in the Circuit and District Courts of the United States, within any State, shall cease to be liens on real estate, or chattels real, in the same manner and not at like periods as judgments and decrees of the courts of such State now cease by law to be liens thereon.’

“These words may be broad enough to comprehend liens in either relation, as regards territory or duration, but the word ‘now’ used in the act, according to the construction given to the Process Act in the Federal courts, would confine its action to the state of things in the several States to which it refers as existing at the time of its passage.

*541] “However this may be, the act clearly recognizes the existence of liens on judgments in the Federal courts, and as it requires that they shall cease in conformity to the State laws, it is just to infer that, in the contemplation of Congress, they exist in conformity to the same laws, and in this recognizing the doctrine held by the courts.

“The foregoing decisions have a bearing on the case under consideration too obvious to call for any remark; and what remains to be said may therefore be said very briefly.

“As regards Pennsylvania, the Statute of 5 George II. was never in force that I can ascertain. The act of 1705, passed by the local legislature, was in existence, and had been for several years before the passage of the former act, and superseded it. No local laws existing in the Colonies of New York, Virginia, Maryland, and others, the British stat-

ute became the law, and the construction it received varied more or less in the several jurisdictions. How far the doctrine of lien, as it grew up in Pennsylvania, was dependent upon the construction given in England to the statute of 1 Edward I., which gave the writ of elegit, I am not able to trace. But that a judgment in Pennsylvania has been uniformly held to be a lien *per se*, liable to no suspension or interruption from any cause short of satisfaction, or its equivalent in law, for a very long time, admits, I think, of no doubt.

"We therefore find, that the judgments of courts of record of the several States have liens attached to them binding real estate, but having their origin in different sources, and therefore varying in their effects; and that the local law is universally adopted in the Federal courts in the decision of local questions, and especially those having connection with real estate; and that the grounds upon which the local laws have been adopted have varied. In Ohio, judgments of the Federal courts are held to be liens, because these courts have adopted the execution laws of the State. In New York, Virginia, and other States, because of the operation of the Process Act; and in Maryland, because a judgment is a lien *per se*.

"Is Pennsylvania an exception to this otherwise universal rule? The only statutory limitation of the liens of judgments in Pennsylvania, as regards territory, is the act of 1799, which has been heretofore referred to, and that act is confined in its operation expressly to the Supreme and Circuit Courts of the State, and cannot be extended, by any construction, so as to affect such liens on the judgments of any other courts.

The case of *White v. Hamilton* held the doctrine, that the lien of judgments in the Supreme Court extended throughout the State, because the jurisdiction of the court was [*542 thus extensive. The same rule has been adopted with regard to all other courts of record of the State, without any special legislation in reference to the subject of liens, but as an incident to the jurisdiction. In all the county courts, there is no other reason perceived why judgments obtained in them are liens throughout the county, but the fact that their jurisdiction extends throughout the county. The mere act of creating a court of record, and specifying the limits of its jurisdiction by State authority, extends the liens of judgments throughout these limits; and the application of the same rule to the Circuit Courts of Pennsylvania must, in accordance with received principles, be attended with like results.

"If this is not the rule in the case under consideration, what is the limit as to territory of the lien of a judgment in the Federal courts of this State? That a lien of some extent

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attaches upon such judgment has been shown by the authority of decided cases, and by fair inference from acts of Congress. What, then, is its territorial extent? Philadelphia County, where this court holds its sessions, is no more specially within its jurisdiction than Lancaster County, or Berks, or Northampton, or any other county of the district. They are all alike, and equally within the territory assigned to the jurisdiction of the court, and to every intent and purpose are equally within its judicial action; and the same cause of argument that would go to exclude the lien of a judgment of this court from Lancaster County, would exclude it from every county of the district, or, in other words, would extinguish it.

"Nor is it readily perceived how a lien on land can be obtained in Pennsylvania through judicial action, unless it attach upon a judgment. In 1 Baldw., 268, the judge, in distinguishing between the effect of an execution, in its operating as a lien on real or personal estate, says,—'As to land, the lien attaches by the judgment, and remains, though no levy be made. The sheriff has no right to take possession, or to enter upon it to make a levy; and after levy, he has neither the right of possession, of property, or power to sell an estate of freehold in defendant, if the property be improved,' &c. So in 1 Pet., 386, it is held, that 'the lien by a general judgment on land gives the right to levy on the same, to the exclusion of adverse interests; and such levy, when made, relates back to the time of the judgment.'

"If land can only be levied by virtue of the lien obtained through the judgment, then the existence of the lien is necessary to sustain the levy; and if the doctrine be true, that no *548] lien attaches upon a judgment of this court, or that such lien does not extend to Lancaster County, then was there nothing to sustain the execution on which the land was sold, and the money raised, which is now the subject of controversy, and the whole proceedings in that connection are void.

"And it may be added, that all the reasons alleged for adopting the local law of lien by the Federal courts apply to judgments in this case. For, 1st, the courts have adopted the execution laws of this State, as fully as in Ohio, where this is the ground alleged for adopting the lien law of that State; 2d, the Process Act applies as entirely to Pennsylvania as to New York and Virginia; and, 3d, a judgment in Pennsylvania is as much a lien *per se*, and forms a rule of title and property in this State, as in Maryland, and is therefore within the provisions of the thirty-fourth section of the Process Act,

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which is the reason assigned for adopting the lien law of the latter State.

"The auditor, therefore, is of opinion, that the authorities quoted sustain the position, that a judgment of this court is a lien upon the lands of the defendant in Lancaster County; and therefore, that the judgment creditors having prior liens are entitled to the fund in court, after payment of the costs and expenses upon the judgments as far as they may be covered by the fund, and the expenses of this reference. The judgments to be paid according to their priority, without regard to the court in which they were recovered, as follows, to wit:—

- 1845, June —. Judgment in the District Court of Lancaster County in favor of the President, Directors, and Company of the Bank of Pennsylvania, entered at December Term, 1841, revived to June term, 1845, for . . . \$24,100.00
Interest to 9th April, 1847, the day of sale.
- 1844, Jan. 20. Judgment in the Circuit Court of the United States for the Eastern District of Pennsylvania, in favor of Richard H. Bayard, Jan. 20, 1844. Judgment for . . . \$17,188.00
Interest to 9th April, 1847, the day of sale.
- 1845, July 25. Judgment of Lombard and Whitmore, in the same court. Judgment obtained July 25, 1845, for . . . \$24,104.57
Interest to 9th April, 1847, the day of sale.
- 1845, July 29. Judgment in favor of the same plaintiffs, in the same court. Judgment obtained July 29, 1845, for . . . \$10,000.00
- 1845, Aug. 26. Judgment in favor of the Bank of *Middletown, in the District Court of Lancaster County, August 26th, 1845. [*544
- 1845, Aug. 28. And another judgment in favor of the same plaintiff, in the same court, obtained Aug. 28, 1845.
- The amount due on both the above judgments, as ascertained by the parties, is . . . \$26,550.47
But from this amount must be deducted any interest allowed in the settlement of the amount, between the 9th April and 9th July, 1847, on which last-named day the settlement is dated.
- 1845, Aug. 28. Judgment in favor of the Dauphin Deposit Bank, in the District Court of Lancaster County, obtained 28th August, 1845, for . \$2,500.00

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Interest to 9th April, 1847.

1845, Aug. 30. Judgment in favor of the President, Directors, and Company of the Farmers' Bank of the State of Delaware, obtained in the Court of Common Pleas of Lancaster County, for . . . \$12,000.00

Judgment obtained August 30, 1845.

Interest from August 30, 1845, to 9th April, 1847.

"All of which is respectfully submitted.

"JAMES HEPBURN, *Auditor.*"

Afterwards, on the same day, exceptions to the auditor's report were filed, which exceptions are in the words following, to wit:—

"On behalf of the Bank of Middletown and the Farmers' Bank of Delaware, we except to the report of the auditor in this case, on the ground that the auditor has erred in deciding that the judgments rendered in this court are a lien on the lands of the defendant in Lancaster County, Pennsylvania, and in awarding the proceeds of the sale of such lands to said judgments, to the exclusion of the judgments of record in the courts in Lancaster County.

"B. H. BREWSTER,

CHARLES B. PENROSE,

*Attorneys for Bank of Middletown and Farmers'
Bank of Delaware.*"

"George W. Harris excepts to the report of the auditor, in the case above referred to, in awarding the money in dispute, *545] *in the said case, to the judgments obtained in the Circuit Court against Henry M. Bayard, instead of the judgment of the Dauphin Deposit Bank against the said Henry M. Bayard, in the District Court of the County of Lancaster, the same being No. 135 of June term, 1845.

"GEORGE W. HARRIS,

Attorney for the Dauphin Deposit Bank.

"September 20, 1847."

On the 11th of October, 1847, the exceptions were argued, and overruled by the court. The report was confirmed, and distribution ordered in accordance therewith.

The counsel for the Bank of Middletown then moved the court to allow the entry of an appeal from the order of the court distributing the proceeds of the execution in this case; which motion, after the hearing of counsel, was overruled by the court.

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The counsel then filed an affidavit, made by Simon Cameron, the cashier of the bank, that the appeal was not intended for delay; and caused Simon Cameron and Alexander Cumming to enter into a recognizance for the prosecution of the appeal with effect. The following note was attached to it by the presiding judge, viz. :—

“N. B.—The above affidavit and recognizance have been sworn and acknowledged before me, at the request of counsel, *valeant quantum valeant*, the court having previously refused, on motion of said counsel, to allow an appeal, on the ground that the party offering to appeal was not entitled to such remedy.

“October 30, 1847.

R. C. GRIER.”

On the 15th of November, 1847, Mr. Penrose moved that a final decree or order be entered, which motion was overruled by the court.

On the 17th of November, 1847, the following præcipe for a writ of error was filed, vis. :—

“HENRY M. BAYARD, a Citizen of Pennsylvania, Plaintiff in error, v. ISRAEL LOMBARD and CHARLES O. WHITMORE, Citizens of Massachusetts, &c., Defendants in error.

“Sir,—Issue writ of error to the Circuit Court of the United States for the Eastern District of Pennsylvania, to remove the record and proceedings in the suit or action wherein the said Israel Lombard and Charles O. Whitmore, citizens of the State of Massachusetts, copartners under the firm of Lombard and *Whitmore, &c., are plaintiffs, [*546 and Henry M. Bayard, a citizen of the State of Pennsylvania, is defendant, No. 28, April session, 1845, including all the final process issued therein, and the proceedings thereupon, and particularly the decree of the said Circuit Court making distribution of the money raised by the sale of the real estate of the defendant, the said Henry M. Bayard, and also the costs taxed therein, the appeal therefrom, the exceptions filed thereto, and the order of the court thereupon.

“Nov. 17th, 1847.

B. H. BREWSTER,

CHAS. B. PENROSE,

Att'ys for Plaintiff in error, and of the Bank of Middletown, and the Farmers' Bank of the State of Delaware.

“GEORGE PLITT, Esq., Clerk of Circuit Court United States, E. D. P.”

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An affidavit and recognizance were filed on behalf of the Bank of Middletown, to which a memorandum was attached, similar to the one just mentioned.

Upon the writ of error thus issued, the case came up to this court. The following assignment of errors was filed.

Errors Assigned.

1. The court erred in confirming the report of the auditor in this case, and in ordering distribution according to that report.

2. The court erred in ordering distribution of the fund raised by the sale of real estate, in Lancaster County, to be made to judgments entered of record in the said Circuit Court, in the County of Philadelphia, instead of to the judgments in favor of the Bank of Middletown and the Farmers' Bank of Delaware, respectively entered of record in the County of Lancaster, which were liens on the land sold.

3. The court erred in assuming jurisdiction to make an order for the distribution of the fund, raised by the sale of the real estate of the defendants below, among the judgment creditors of the defendants, some of such creditors having judgments of record in the State courts of the County of Lancaster, and in refusing to the Bank of Middletown, one of these creditors, an appeal to the Supreme Court of the United States, under the act of the General Assembly of the Commonwealth of Pennsylvania, passed the 16th April, 1827, entitled "An act relative to the distribution of money arising from sheriffs' and coroners' sales," &c., which gives such jurisdiction to State courts.

4. The court erred in overruling the exceptions to the costs *547] *taxed by the clerk of the court, and in allowing the sum of two hundred and fifty dollars to the auditor, and a commission to the clerk on money not deposited in court, amounting to the sum of , to be deducted from the fund.

5. The court erred in refusing to enter a final decree in the case.

Filed 7th January, 1848.

The case was argued by *Mr. Brewster*, for the plaintiff in error, and *Mr. John M. Read*, for the defendants in error.

Both the counsel went into an elaborate investigation of the nature and extent of a lien upon land created by a judg

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ment in the Circuit Court; but as the decision of this court rested upon a collateral point, it is not deemed necessary to take further notice of these arguments. The right of appeal was more briefly discussed.

Mr. Brewster, for the plaintiff in error, thus noticed that point.

The fifth exception is, that the court erred in refusing to enter a final decree in the case.

The plaintiff in error contends that the decree rendered in this case was in the nature of a final and absolute decree and judgment, and as such upon it a writ of error or an appeal will lie, under the twenty-second section of the statute of 1789. In Pennsylvania, at one time, by the practice of our courts, when the sheriff was ruled to pay into court money arising from the sale of real estate, all disputes between conflicting claimants were heard by the court itself; this becoming a burden upon the courts, they adopted the method of referring these questions to auditors, whose decisions were reported to the court by whom they were appointed; this continued till 1827, when the following statute was passed:—

“In all cases of sheriff’s or coroner’s sale, where there are or may be disputes about the distribution of moneys arising therefrom, the respective Courts of Common Pleas, District Courts, and Courts of Nisi Prius within this Commonwealth, are hereby declared to have full power and authority to hear and determine all such cases according to law and equity.” Act of 16th April, 1827, Pamph. Laws, 471.

By this statute, if an issue in fact was raised and tried by a jury, the judgment in the issue was subject to a writ of error, and if decided by the court without the intervention of a jury, the party aggrieved by the decision might appeal to the Supreme Court.

*The court in this very case adopted the method of practice used in the State courts under this statute of 1827, and by appointing an auditor to distribute the money, they have incorporated the provisions of the statute into their code of practice, and, as the plaintiff alleges, thereby adopted the whole of the statute, which, as has been before said, gave a writ of error and an appeal to the Supreme Court of the State. That statute of Pennsylvania in effect makes such a decree of the court a final judgment, and as the parties and their rights are concluded by it, they are entitled to the advantage of a hearing in a court of review. The act of Congress of 1828 authorizes this adoption of our State prac-

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tice, and by its adoption the Pennsylvania act of 1827 has become a part of the law of the Circuit Court. *Mayberry v. Thompson*, 5 How., 126; *Boyle v. Zacharie*, 6 Pet., 648.

Mr. Read, for the defendants in error, contended that the case was not regularly before this court.

1. It is not here by appeal, nor are either of the banks in any manner parties in this court. This has been already stated.

2. A writ of error does not lie to the distribution of money under the sale of a marshal. This was the settled law of Pennsylvania prior to the act of 1827. 17 Serg. & R. (Pa.), 278.

The defendant below has no error to complain of, because his property is paid to his creditors in discharge of their debts, and it is immaterial to him in point of law which one is paid in preference to the other.

No judgment creditor can sustain a writ of error, because he is not a party to the suit, which is a common law proceeding. Therefore, neither the Bank of Middletown nor the Farmers' Bank of Delaware could bring this writ of error, nor are they in any manner parties thereto.

These points are made as a matter of duty to the court, but the defendants in error have the fullest reliance on the correctness of the decision of the Circuit Court upon the real question in the cause.

Mr. Justice GRIER delivered the opinion of the court.

This case has been brought here, both by writ of error and appeal, for the purpose of reviewing the decision of the Circuit Court for the Eastern District of Pennsylvania, with respect to the lien of judgments obtained in that court. But as we are of opinion that the ruling of the Circuit Court on this subject is not properly before us on the record, we cannot *549] consent to *volunteer an expression of our judgment upon it, however much it may be desired by the parties.

A brief statement of the history of the case, and of the peculiar practice of the courts of Pennsylvania on this subject, will make it apparent that the decision of the court below involving this question is not properly before us, either by the appeal or the writ of error.

The record shows, that Lombard and Whitmore obtained a judgment against Bayard, the nominal plaintiff in error in this case, on a bond for \$62,420, conditioned for the payment of \$31,210. An execution on this judgment was issued, re-

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turnable to April term, 1846, on which the marshal returned a levy on certain lands of the defendant situate in Lancaster County, and within the Eastern District of Pennsylvania. An inquisition was held, and the property condemned, according to the practice and laws of that State. A *venditioni exponas* was afterwards issued, on which the marshal returned, that he had sold the property levied on for the sum of \$61,200. These proceedings are admitted to be all regular, and according to law.

In Pennsylvania, a judicial sale discharges the land sold from all liens, except (now) prior mortgages. When, therefore, land is once sold on execution, and converted into money, all persons who claim to have liens upon it by judgment or otherwise (with a few exceptions) are compelled to follow the money or lose their security. Hence it often happens that, when money is made by sale of land on a junior judgment, the plaintiff does not obtain satisfaction, and is sometimes involved in a fresh litigation with creditors claiming to have prior liens. In these contests the defendant is usually an indifferent spectator. For many years there was no settled practice as to the mode in which these new disputes should be litigated.

In some districts the sheriff paid the money in his hands to such parties as he thought best entitled to it, and took an indemnity against other claimants, who were thus compelled to seek their remedy by suit on his bond. In other districts, the sheriff avoided responsibility by paying the money into court, and leaving the claimants to settle their controversies in such manner as the court might order, or the parties elect. In such cases, the court usually disposed of the money on the motion of the parties interested, by ordering the liens to be paid in the order of their priority, as certified by the clerk. But as it not unfrequently happened that the junior judgment creditors contested the validity of the lien of the older judgment, because it was not regularly revived, or for other reasons; or challenged *it for fraud and collusion; or [*550 insisted that it had been paid in whole or in part, it became necessary that the court should in some way try and decide these questions thus raised by new parties before any proper disposition could be made of the money. In such cases, where the counsel expected questions to arise which they might desire to have reviewed by writ of error, they took care, by the form of an amicable action, or by case stated in the nature of a special verdict, to shape the proceedings in such form and with such parties that a writ of error

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would lie in favor of those who felt aggrieved by the decision of the court.

But it was conceded by all, that, if the money was distributed by the court on motion, a writ of error could not reach the proceeding, and the decision of the court was conclusive on all parties. (See *Gratz v. Lancaster Bank*, 17 Serg. & R. (Pa.), 279.)

Such was the practice in the courts of Pennsylvania, till the year 1827, when an act of Assembly was passed, requiring the court to direct an issue in such cases, at the request of any claimant, and to give notice to all persons interested; and allowing a writ of error where the issue was tried by a jury, and an appeal when the question was submitted to the court.

In the case before us, the marshal paid the money into court, and motions were made by the Bank of Middletown and others for leave to take it out of court, which were resisted by Lombard and Whitmore, the plaintiffs in the judgment. The court appointed an auditor to make report as to the parties entitled to the money, with directions to give notice to all parties concerned. The auditor made a report, giving a preference to the judgments according to their priority in time. The Bank of Middletown, and others who had junior judgments in the State courts of Lancaster County, excepted to the report, alleging that judgments in the Circuit Court of the United States were not liens on the lands of defendant in Lancaster County, or out of the County of Philadelphia.

This exception was overruled by the court, and the report of the auditor confirmed. From this decision of the court the Bank of Middletown appealed, and on suggestion of a doubt by the court whether an appeal would lie, a writ of error was also sued out by counsel professing to act "as attorneys for plaintiff in error, and for the Bank of Middletown and the Farmers' Bank of Delaware."

But no errors have been assigned in this court, to the judgment or execution, on behalf of the plaintiff in error. As against him, all the proceedings are admitted to be regular *551] and *legal. It is a matter of indifference to him whether the money raised by the sale of his lands on the execution is awarded to defendants in error or to the banks. The assignment of errors in this case is on behalf of persons who are not parties to the record, and of a matter arising after execution executed, on a motion by strangers to the judgment and proceedings, and an order of the court dis-

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posing of certain funds in their possession accidentally connected with this record.

It is a well settled maxim of the law, that "no person can bring a writ of error to reverse a judgment who is not a party or privy to the record." "A writ of error lies when a man is grieved by an error in the foundation, proceeding, judgment, or execution" in a suit. Co. Lit., 288, *b*; see also *Boyle v. Zacharie*, 6 Pet., 655, and cases cited. The judgment or order of the court on a summary motion, or a collateral question arising like the present on the suggestion of a third party, is not reëxaminable on a writ of error issued on the judgment with which it may happen to be connected.

The Circuit Court of the United States has adopted the forms of process in execution of the State courts, and the laws and practice of Pennsylvania, for taking lands on execution and disposing of their proceeds. But it is not a consequence of their adoption of them that the modes of reviewing the decisions of the Circuit Court by this court should be conformed to the laws or practice of the State. For it cannot be pretended that Acts of Assembly of Pennsylvania can give jurisdiction to this court not to be found in the Constitution and acts of Congress of the United States.

The absence of courts of equity in Pennsylvania has compelled them to adopt modes of practice in their courts of common law anomalous in their character, and unnecessary in a court possessing the full powers of a court of chancery. An appeal to this court is given in chancery cases alone. And the writ of error given by the Judiciary Act is governed by the provisions of that act and the principles of the common law, as regards the judgments and questions which may be reviewed under it. The persons complaining in this case should have filed their bill in equity, or stated an issue in due legal form, with proper parties, setting forth the merits of their respective claims, if they intended to prosecute an appeal or writ of error to this court. This could have been done with less expense and trouble, and in less time, than in the mode pursued. But having submitted the question on which their claim depended to the court below, on a motion collateral to the record, the decision of that court is final and conclusive, and cannot be reviewed by this court.

*Therefore, as no error appears on the record, the judgment of the Circuit Court must be affirmed. [*552

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the

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Eastern District of Pennsylvania, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

BENJAMIN H. LAMBERT AND LEWIS MCKENZIE, PLAINTIFFS, v. WILLIAM GHISELIN.

In an action upon a bill of exchange brought by the holder, residing in Alexandria, against the indorser, a physician residing in Maryland, the bill upon its face not being dated at any particular place, it was sufficient proof of due diligence to ascertain the residence of the indorser before sending him notice of the dishonor of the bill, that the holder inquired from those persons who were most likely to know where the residence of the indorser was.¹

Where a notice is sent, after the exercise of due diligence, a right of action immediately accrues to the holder, and subsequent information as to the true residence of the indorser does not render it necessary for the holder to send him another notice.²

THIS case came up from the Circuit Court of the United States for the District of Maryland, upon a certificate of division in opinion between the judges thereof.

It was a suit brought by Lambert and McKenzie, carrying on business as partners in Alexandria, Virginia, against William Ghiselin, the indorser of the following bill of exchange.

[Stamp 75 cents.]

April 21, 1846.

Ninety days after date pay to the order of William Ghiselin fifteen hundred dollars 1000 , value received, and charge the same to account of your obedient servant,

ROBERT GHISELIN.

To JOHN R. MAGRUDER & SON, *Baltimore.*

(Indorsed,) John R. Magruder & Son.

(Indorsed,) William Ghiselin, Lambert & McKenzie.

Pay to the order of C. C. Jamison, Cashier.

JOHN HOFF, *Cashier.*

Jamison was the Cashier of the Bank of Baltimore, who *553] caused the bill to be presented, when due, to the acceptors in Baltimore, and to be protested for non-payment.

¹ CITED. *Watson v. Tarpley*, 18 How., 519.

² QUOTED. *Rowland v. Rowe*, 48 Conn., 444.

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In November, 1847, the cause came on for trial in the Circuit Court, when the plaintiffs offered the bill in evidence, together with the notarial protest.

The plaintiffs then further gave in evidence, by William H. Lambert, a competent witness, that on the 24th day of July, 1846, he was the assistant clerk in the counting-house of the plaintiffs, who were then, and still are, doing business in Alexandria, now in the State of Virginia, under the name and style of Lambert & McKenzie; and that on the said 24th day of July, 1846, the witness saw inclosed in a letter addressed to the defendant, at Nottingham, Maryland, the original notice, whereof the paper marked A is a true copy.

Copy of Notice of Protest.

(Copy A.)

"BALTIMORE, July 23, 1846.

"MR. WILLIAM GHISELIN:—Sir: Please take notice that Robert Ghiselin's bill of exchange on John R. Magruder & Son, for \$1,500 (by them accepted), dated April 21, 1846, and payable ninety days after date to your order, and by you indorsed, is delivered to me by the President, Directors, and Company of the Bank of Baltimore, to be protested for non-payment; and the same not being paid, is protested, and will be returned to the said president, directors, and company, and that you are held liable for the payment thereof.

"SAMUEL FERNANDIS, *Notary Public.*"

That said witness on said day deposited the said letter inclosing the said notice in the said post-office, at said Alexandria, in time to go in the mail of that day.

And the plaintiff further gave in evidence, by Captain Thomas Travers, a competent witness, that he arrived in his vessel at the port of Alexandria aforesaid, early in the morning of the said 24th day of July, 1846; and that immediately after his arrival at the wharf, the plaintiff, Lambert, inquired of him if he knew the residence of the defendant; to which said witness replied, Nottingham,—that he resided at Nottingham, and a post-office was kept there.

And further gave in evidence by said witness, that he had been engaged from the year 1821 to 1842 in sailing a vessel, in which the plaintiffs were part owners, between Nottingham and Alexandria, previous to 1842; that during said time no other vessel was engaged regularly in trading between said places, except a vessel commanded by one Isaac Wood, in which the plaintiffs were also interested; that after 1842 there was no vessel regularly trading between [*554

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Alexandria and Nottingham, which last place is a small village on the head-waters of the Patuxent River, in Prince George's County, Maryland; and that up to the time when the witness ceased to trade there, the defendant resided in Nottingham, where he practised medicine, and had kept house there, and the said Travers had never heard of his removal from thence; that he, the defendant, was raised in the immediate neighborhood of Nottingham, where his brother, Robert Ghiselin, and his mother and other relations resided.

And also further gave in evidence by said Travers, that he was, in July, 1846, well acquainted in Alexandria, and knows of no one in said town who was better qualified to furnish information, or was more likely to have furnished information, as to the residence of the defendant, than himself; that in 1842 the vessel owned by the witness and Lambert and McKenzie, and commanded by witness, as well as the vessel commanded by Isaac Wood, ceased to trade between Alexandria and Nottingham, and commenced trading or running regularly between Alexandria and Baltimore city, in which trade they have been ever since constantly engaged, as was well known to the plaintiffs; that since 1842 the witness had never been at Nottingham, nor seen the defendant.

The plaintiffs further gave in evidence, by Isaac Wood, a competent witness, that he has resided for a great many years in Alexandria, and is well acquainted with the inhabitants thereof, and he knows of no one in said town to whom the plaintiffs could have applied for information as to the residence of the defendant more likely than Captain Travers to afford correct information, or himself, who was absent at the time.

And said witness, Thomas Travers, on cross-examination, repeated, that he believed the defendant in 1842 resided in Nottingham, and was very confident that he had seen the defendant there on several occasions in the course of the year 1840, but could not affirm positively that he saw the defendant there at any time during the year 1839, or 1841, or 1842.

And the defendant also proved, by Thomas S. Alexander, that he is well acquainted with the defendant, being connected with him by marriage, and knows the defendant moved from Nottingham in the summer of 1839; that he first went to the city of Annapolis, distant about thirty miles from Nottingham, proposing that he should remain there until he had found a place of permanent settlement, and that, having purchased a farm on West River, he took up his residence there
*555] towards *the end of 1839; the said witness had frequently been at the residence of defendant on West

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River, and, from his (witness's) knowledge of the surrounding country, would have been prepared to affirm that "West River" post-office was the post-office of defendant; and, moreover, that he has accompanied the defendant to the said named post-office for his (defendant's) letters, and has frequently, prior to the making and indorsement of the bill on which this action is founded, been informed by said defendant that his post-office was "West River"; that "West River" post-office is within two miles of the residence of the defendant, and Nottingham is distant from said residence at least twelve miles; and on cross-examination, the said witness stated that defendant had relations residing in and about Nottingham, and witness was satisfied, from statements of defendant and others, that defendant had visited said relations frequently since his removal in 1839, and that witness had seen him on several occasions with said relations.

And defendant likewise proved, by John R. Magruder, junior, one of the acceptors, that he is well acquainted with the defendant, being his relation; and that John R. Magruder, senior, was at one time the commission agent of defendant; that shortly after the 23d of July, 1846, (he is confident within a fortnight, and he believes that it was within a week, thereafter,) the plaintiff, Lambert, called at the counting-house of John R. Magruder & Son, the acceptors, and then and there inquired of the witness where the defendant's post-office was; the said witness answered, he believed it was West River, but was not certain, as John R. Magruder & Son were not at that time the agents of the defendant, and that he would go out and inquire of Battee & Sons, the defendant's agents at that time; that witness accordingly went out, and being informed by Battee & Sons that West River was defendant's post-office, he returned and communicated that fact to the plaintiff.

The drawer of the bill of exchange, upon which the present suit was brought, it was in proof, resided near Nottingham, Prince George's County, Maryland, and that the drawers and acceptors resided in the city of Baltimore, and the defendant at West River, Anne Arundel County, Maryland, and there was at this time a daily mail between Baltimore and Alexandria.

Upon the testimony above stated, the question occurred whether due diligence had been used by the plaintiffs, the holders of the bill, to give to the defendant, the indorser thereof, notice of the dishonor of said bill.

Upon which question the opinions of the judges being

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*556] *opposed, the point, upon the request of the plaintiffs' counsel, is hereby certified to the Supreme Court.
R. B. TANEY,
U. S. HEATH.

Upon this certificate, the cause came up to this court.

It was argued by *Mr. May*, for the plaintiffs, and *Mr. Meredith*, for the defendant.

Mr. May contended, that from the evidence it was apparent that the plaintiffs used due and reasonable diligence to transmit the notice to the supposed post-office of the defendant, and the following authorities will be relied on, viz., *Harris v. Robinson*, 4 How., 345; Story on Prom. Notes, § 316; Chit. on Bills, 458; 1 Barn. & C., 245.

Supposing, then, that the plaintiffs used due diligence when they sent the notice, it is immaterial whether it was received. Story on Prom. Notes, § 328.

Nor could the evidence in this record, that, some weeks after this notice was sent, the plaintiffs were informed of the proper office to which it ought to have been sent, have any influence on this question, because the right of action, once vested by reason of the transmission of the notice after due diligence at that time, could not be divested by subsequent laches, nor do the cases require the transmission of a second notice when the first was sent after due diligence.

Mr. Meredith, for the defendant, contended,—

1st. That, upon the evidence, the plaintiffs did not use due diligence to discover the residence of the defendant, at the time the bill was protested, and before they sent notice of the protest addressed to the defendant at Nottingham, Maryland.

2d. That having, as was proved, ascertained within a week or a fortnight after the said bill fell due and was protested, that the defendant did not reside at Nottingham, but that he resided on West River, in Anne Arundel County, Maryland, and that West River post-office was the post-office at which the defendant received his letters, the plaintiffs ought then to have given notice to the defendant of the dishonor of said bill, by sending the same, addressed to him at West River post-office, or otherwise; and there being no evidence that they gave such notice, the plaintiffs are not entitled to recover.

Upon the first point the following references were made:—

Chit. on Bills (10th American from 9th London edition), 452, 453, 454, and notes; *Story on Prom. Notes*, 370, *n. 1; [**557 Beveridge v. Burgis*, 3 Campb., 262; *Barnwell v. Mitchell*, 3 Conn., 101; *Hill v. Varrell*, 3 Greenl. (Me.), 233; *Story on Prom. Notes*, 368; *Hartford Bank v. Stedman*, 3 Conn., 489; *Bank of Utica v. Mott*, 13 Johns. (N. Y.), 432; *Johnson v. Harth*, 1 Bail. (S. C.), 482; *Chitty on Bills*, 433, 488, 489, 490; *Bayley on Bills*, ch. 7, § 2, pp. 280 to 283 (5th edit. 1830); *Planters' Bank v. Bradford*, 4 Humph. (Tenn.), 39.

Upon the second point, *Chitty on Bills*, same pages, and 451, 452, and note o; *Baldwin v. Richardson*, 1 Barn. & C., 245 (8 E. C. L., 66); *Browning v. Kinnear*, 1 Gow, 81 (5 E. C. L., 471); *Bateman v. Joseph*, 2 Campb., 461; *Firth v. Thrush*, 8 Barn. & C., 387 (15 E. C. L., 242); *Williams v. Bank of U. States*, 2 Pet., 96, 100; *Galpin v. Hard*, 3 McCord (S. C.), 394; *Preston v. Dayson*, 7 La., 7; *Sturges v. Derrick*, Wightw., 76, 77.

Mr. Chief Justice TANEY delivered the opinion of the court.

The facts upon which the question certified has arisen are not disputed. The sufficiency of the notice is therefore a question of law. And it is of the first importance to the commercial community, that the rules which regulate the rights and liabilities of parties to negotiable instruments in courts of justice should be plain and certain, and conform to the established usages of trade.

Two objections have been taken to the sufficiency of the notice in this case. 1st. That due diligence was not used by the holder to ascertain the residence of the indorser before the notice was sent to Nottingham. And 2d. If reasonable diligence was used at that time, yet the information he afterwards received in Baltimore imposed on him the obligation of giving a further notice to the defendant himself, or of sending it by mail to his nearest and usual post-office.

As regards the first question, the court is of opinion that due diligence was used before the notice was sent to Nottingham. The case shows that there was very little, if any, trade between Alexandria and Nottingham at the time of this transaction, and but few persons, therefore, in Alexandria would be likely to know whether the defendant did or did not reside in Nottingham. The bill of exchange was not dated at any particular place, and the acceptors resided in Baltimore. The defendant was not engaged in trade, but was a physician residing in the country, and it does not ap-

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pear that he was in the practice of visiting Alexandria, or of having any business transactions there. And the proof is, that Travers, of whom the holder inquired, from the nature *558] of the trade in which he had been many years *engaged,—first to Nottingham and afterwards to Baltimore,—was as likely as any other person in Alexandria to give the information which the plaintiffs were seeking to obtain, if not more so. The answer he received was direct and positive, both as to the knowledge of Travers and the residence of the indorser, and he had a right to rely upon it. And although Travers was mistaken, and the notice was not sent to the nearest or usual post-office of the defendant, yet the plaintiffs used all the diligence which the law requires, and had sufficient reason to believe that the notice would be received. The liability of the indorser was therefore fixed. The case of *Harris v. Robinson*, 4 How., 345, is conclusive on this point.

The second objection taken in the argument has not been so directly settled by judicial decision on the point, but is, we think, equally clear upon established principles.

We have already said, that the liability of the indorser was fixed by the notice sent to Nottingham. The plaintiffs had acquired a right of action against him by this notice, and might have brought their suit the next day. Could that right be divested by the information which was subsequently given to them? We think not, and that all of the cases in relation to this subject imply the contrary. The books are full of cases where mistakes of this kind have been committed, and suits afterwards brought when the residence of the party was discovered. Yet it does not seem to have been supposed in any of them that a second notice was necessary, nor are we aware that such a point has ever been raised. Yet if a notice thus given, after diligent inquiry, is not equivalent to actual notice, knowledge subsequently obtained would be a defence to the action, even if the holder had brought suit before he learned what was the nearest or usual post-office of the defendant.

The case of *Firth v. Thrush*, 8 Barn. & C., 387, which was much relied on in the argument, depended upon different principles. In that case, the holder knew that notice had not been given to the indorser. He had been engaged in making inquiries for his residence, without being able to obtain any information upon which he might have acted. And the question here was not whether a second notice should be given, but whether due diligence was used in sending the first.

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The rule contended for by the defendant would produce much uncertainty and difficulty in transactions of this kind. For if a second notice must be given, is it to be required in all cases where there has been an error in the information as to the defendant's post-office? Certainly the practice of the courts has been otherwise. And if it is not to be required in all cases, *it would be impossible to fix any certain limits as to time or circumstances. The subsequent information might come to him casually, when his mind was occupied with other engagements; he might not confide in it as much as in that which he had before received; it might come to him in a few days, or months might elapse before he obtained it. The rule would be loose and uncertain in its application, and constantly lead to litigation, where the residence of the indorser was unknown, or an error committed as to his usual post-office. It would also be contrary, the court think, to the usages of commerce, and to the uniform practice in courts of justice. In the case of *Harris v. Robinson*, before referred to, no second notice was given; nor did the court intimate that any was necessary.

The law does not require actual notice. It requires reasonable diligence only, and reasonable efforts, made in good faith, to give it. And if sufficient inquiries have been made, and information received upon which the holder has a right to rely, a mistake as to the nearest post-office or usual post-office does not deprive him of his remedy. He has done all that the law requires; and the notice thus sent fixes the liability of the indorser as effectually as if he had actually received it. This we think is the true rule, and the only one that can give certainty and security in transactions in commercial paper.

We shall therefore certify, that reasonable diligence was used by the plaintiffs to give the defendant notice of the dishonor of the bill.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maryland, and on the point or question on which the judges of the said Circuit Court were opposed in opinion, and which was certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel. On consideration whereof, it is the opinion of this court, that, upon the facts in this case, due diligence had been used by the plaintiffs, the holders of the bill, to give to the defendant, the indorser thereof, notice of

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the dishonor of said bill. Whereupon, it is now here ordered and adjudged by this court that it be so certified to the said Circuit Court.

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On the 3d of March, 1825, Congress passed an act (4 Stat. at L., 121) providing for the punishment of persons who shall bring into the United States, with intent to pass, any false, forged, or counterfeited coin; and also for the punishment of persons who shall pass, utter, publish, or sell any such false, forged, or counterfeited coin.

Congress had the constitutional power to pass this law. Under the power to regulate commerce, Congress can exclude, either partially or wholly, any subject falling within the legitimate sphere of commercial regulation; and under the power to coin money and regulate the value thereof, Congress can protect the creature and object of that power.¹

The doctrines asserted by this court in the case of *Fox v. The State of Ohio* (5 How., 433) are not inconsistent with that now maintained.²

THIS case came up from the Circuit Court of the United States for the Northern District of New York, upon a certificate of division in opinion between the judges thereof.³

The record in the case is so very short, that the whole of it may be inserted.

“UNITED STATES OF AMERICA,
Northern District of New York, ss.

“At a Circuit Court of the United States, begun and held at Albany, for the Northern District of New York, in the Second Circuit, on the third Tuesday of October, in the year of our Lord 1848, and in the seventy-third year of American Independence.

“Present, the Honorable Samuel Nelson and Alfred Conkling, Esquires.

¹ APPLIED. *Dred Scott v. Sandford*, 19 How., 622, *Loyal Tender Cases*, 12 Wall., 530. FOLLOWED. *Moore v. People of Illinois*, 14 How., 20. CITED *Ex parte Carll*, 16 Otto, 523, *Ex parte Houghton*, 7 Fed. Rep., 658, s. c., 2 Crim. L. Mag., 760; 8 Fed. Rep., 897.

The offence of making counterfeit coin is not a felony under any act of Congress. *United States v. Copper-smith*, 1 Crim. L. Mag., 741. Nor is such offence an infamous crime with the fifth amendment to the Constitution; and it may therefore be prosecuted by information. *United States*

v. Yates, 2 Crim. L. Mag., 520.

The Federal courts have exclusive jurisdiction over the offence of passing counterfeit national bank bills, and where a person is imprisoned by a State court upon a charge of such offence, a writ of *habeas corpus* will issue to release him. *Ex parte Houghton*, 2 Crim. L. Mag., 759.

² APPLIED *State v. Oleson*, 26 Minn., 518, s. c., 1 Crim. L. Mag., 599. See *Coleman v. Tennessee*, 7 Otto, 537, 539.

³ See *Forsyth v. United States*, post, *572.

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"THE UNITED STATES OF AMERICA v. PETER MARIGOLD.*"State of the Pleadings.*

"This is an indictment against the defendant, charging him, under the twentieth section of the act of Congress entitled 'An act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes,' approved March 3, 1825,—

"1st. With having brought into the United States, from a foreign place, with intent to pass, utter, publish, and sell as true, certain false, forged, and counterfeit coins, made, forged, and counterfeited in the resemblance and similitude of certain gold and silver coins of the United States, coined at the mint, he knowing the same to be false, forged, and counterfeit, and intending thereby to defraud divers persons unknown.

"2d. With having uttered, published, and passed such counterfeit coins, with intent to defraud, &c.

*"To this indictment the defendant demurs, and George W. Clinton, attorney of the United States for [*561 the said district, who prosecutes in this behalf, joins in demurrer.

"This cause coming on to be argued at this term, the following questions occurred:—

"1st. Whether Congress, under and by the Constitution, had power and authority to enact so much of the said twentieth section of the said act as relates to bringing into the United States counterfeit coins.

"2d. Whether Congress, under and by virtue of the Constitution, had power to enact so much of the said twentieth section as relates to uttering, publishing, passing, and selling of the counterfeit coins therein specified.

"On which said several questions the opinions of the judges were opposed

"Whereupon, on motion of the said attorney, prosecuting for the United States in this behalf, that the points on which the disagreement has happened may, during the term, be stated under the direction of the judges, and certified under the seal of the court to the Supreme Court, to be finally decided,—it is ordered, that the foregoing state of the pleadings and statement of the points upon which the disagreement has happened, which is made under the direction of the judges, be certified, according to the request of the attorney, prosecuting as aforesaid, and the law in that case made and provided."

The case came up to this court upon this certificate.

The clauses in the Constitution of the United States and the act of Congress were the following.

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By the fifth and sixth clauses of the eighth section of the first article of the Constitution, it is declared that Congress shall have power, among other things, "to coin money, regulate the value thereof and of foreign coin, and fix the standard of weights and measures"; "to provide for the punishment of counterfeiting the securities and current coin of the United States." 1 Stat. at L., 14.

By the twentieth section of the Crimes Act of 3d March, 1825 (4 Stat. at L., 121), it is enacted, "That if any person or persons shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or willingly aid or assist in falsely making, forging, or counterfeiting, any coin in the resemblance or similitude of the gold or silver coin which has been, or hereafter may be, coined at the mint of the United States, or in the resemblance or similitude of any foreign gold or silver coin which by law now is, *562] or *hereafter may be made, current in the United States; or shall pass, utter, publish, or sell, or attempt to pass, utter, publish, or sell, or bring into the United States from any foreign place with intent to pass, utter, publish, or sell, as true, any such false, forged, or counterfeited coin, knowing the same to be false, forged, or counterfeited, with intent to defraud any body politic or corporate, or any other person or persons whatsoever, every person so offending shall be deemed guilty of felony, and shall on conviction thereof be punished by fine not exceeding five thousand dollars, and by imprisonment and confinement to hard labor not exceeding ten years, according to the aggravation of the offence."

The case was argued by *Mr. Johnson* (Attorney General), for the United States, and *Mr. Seward*, for the defendant.

Mr. Johnson contended, that both questions should be answered in the affirmative.

1. Because, under the fifth clause of the eighth section of the first article of the Constitution, the power to coin money, regulate the value thereof and of foreign coin, includes the power in question.

2. Because, if it does not, it is included in the power to provide for the punishment of counterfeiting the securities and current coins of the United States, in the succeeding clause of the same section.

3. Because, if the question was at any time a doubtful one, it is to be considered as settled by legislative and judicial precedents, as well upon these provisions as, with reference to this question, upon analogous provisions in the Constitution. 3 Story on Const., § 1118; Rawle, ch. 9, p. 163; The Feder-

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alist, No. 42; Act of 21st April, 1806 (2 Stat. at L., 404); *McCulloch v. State of Maryland*, 4 Wheat., 401, 409, 416-419, 421.

Mr. Seward contended that the whole question had been adjudicated in the case of *Fox v. The State of Ohio*, 5 How., 433.

The State of Ohio had enacted a law, "that, if any person shall counterfeit any of the coins of gold, silver, or copper currently passing in this State, or shall alter or put off counterfeit coin or coins, knowing them to be such," &c. 29 Ohio Stat., 136, quoted 5 How., 432. Malinda Fox was convicted of passing, with fraudulent intent, a base and counterfeit coin, in the similitude of a good and legal silver dollar. She brought a writ of error to this court, on the ground [*563 of the unconstitutionality of the Ohio statute. The judgment was affirmed, and so the Ohio statute was sustained.

This decision is conclusive that the portions of the law of Congress of 1825 now under consideration are unconstitutional. But this argument requires the following conditions to be established:—

1. That the offence prohibited by this portion of the act of Congress, and the offence forbidden by the Ohio Statute, be identical.

2. That the constitutionality of the Ohio law appears to have been sustained upon the ground, not of a concurrent jurisdiction of the offence in the State and national governments, but on the ground of an exclusive jurisdiction residing in the State alone.

3. That the principle thus decided was necessarily involved in that case, and therefore the authority in that case is not *obiter*, but *res adjudicata*.

That the coin in the Ohio case was legalized coin was assumed by the whole court, including Judge McLean. Daniel's Opinion, 5 How., 432. McLean's Opinion, 5 How., 436.

I. The offences were identical under the two acts. In the Ohio statute, it was not the "making, the forging, or the counterfeiting, or the aiding in making, forging, or counterfeiting the coin"; it was the "*putting off* counterfeit coin or coins, knowing them to be such." *Putting off* in the one case, and passing in the other, are identical. Importing, or bringing in from other places, with intent to pass, is of the same character, as opposed to making, forging, or counterfeiting. And this is the test, as established by the Supreme Court. *Fox v. Ohio*, 5 How., 433.

And there is yet another index in the test. It is the party

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to be directly affected by the fraud ;—in the one case, the government ; in the other, individuals. And the act of Congress of 1825 includes this very intent to defraud individuals, not the government.

II. The constitutionality of the Ohio law appears to have been sustained upon the ground, not of a concurrent jurisdiction of the offence in the State and national governments, but on the ground of an exclusive jurisdiction in the State.

Nothing could be more direct or explicit than the language of the court (5 How., 433) ;—“ We think it manifest that the language of the Constitution, by its proper signification, is limited to the facts, or to the faculty in Congress of coining and of stamping the standard of value upon what the *564] government creates or shall adopt, and of punishing the offence of producing a false representation of what may have been so created or adopted. The imposture of passing a false coin creates, produces, or alters nothing ; it leaves the legal coin as it was,” &c.

III. The question was directly involved in that case. Judge Daniel so held it. So did Judge McLean (5 How., 437) :—“ And these powers must be incomplete, and in a great degree inoperative, unless Congress can exercise the power to punish the passing of counterfeit coin.”

But it was indispensably involved in that case. The court could only obtain jurisdiction of the Ohio case on the ground that the Ohio law conflicted with the constitutional sovereignty of the United States. That conflict was the exact, the controlling question. If a question at all what were the boundaries of the respective jurisdictions, it was not incidental, but material, essential. If you could now say that the jurisdictions are concurrent, you could equally say that the State had no jurisdiction at all. The whole course of reasoning, of logic, must be changed.

What is *obiter* ? Judge McLean’s reasoning is conclusive, that the power must be exclusive in the States ; since he shows that where it resides it must be exclusive. 5 How., 438, 439.

The views thus submitted are sustained by the opinion of Conkling, Judge of the District Court of the United States for the Northern District of New York, in the case of *The United States v. —*, Law Rep., June, 1849, p. 90. And they are opposed by Brockenbrough, District Judge for the Western District of Virginia, in the case of *Campbell v. United States*, 10 Law Rep., 400. But the learned judge only shows, that, as the precise questions had not been decided by the Supreme Court in a case where the indictment was for pass-

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ing counterfeit coin, he felt himself at liberty to sustain indictments found under the act of 1825. The act of 1825 must be assumed to have been known to the Supreme Court when they decided the case of *Fox v. Ohio*.

The argument derived by Judge Brockenbrough from the analogy to the provision concerning the post-office is untenable; because in that case the Constitution did not define the power of Congress, but left a full discretion; whereas, in the case of coin, the Constitution defines the power of punishing counterfeiting, and limits it to the making of the spurious coin.

The British statutes define two classes of offences in regard to coin,—the making and the passing; and the terms of the Constitution adopt the former only.

*This distinction was recognized in the case of *Fox v. Ohio*. And Judge Brockenbrough admits it. And [*565 he concedes that the power to punish the passing is not derived from any amplification of the term *counterfeiting* in the Constitution. 10 Law Rep., p. 404. But the Judge maintains that it is an implied power.

But the court forgets that the Constitution found all the States in possession of jurisdiction over private frauds; and it is to be inferred that it was thought that jurisdiction might best be left there. The question now is, not whether it was wisely left there, but whether it was left there. The Judge (Brockenbrough) erred in assuming that the denial of jurisdiction to Congress in the case of *Fox v. Ohio* was *obiter*. On the contrary, the court expressly deny it, and argue upon the opposite assumption as one conceded, not in fact, but only for argument's sake.

The provision is wise as it is now settled. Congress is to furnish a uniform currency for all the States, and is to punish the crime of forging it. But the multiplied ramifications of crime require that the courts of the several States should have power to punish frauds in commerce and traffic, as well when coin is the instrument as in other cases. The machinery of State police and penal jurisprudence is better adapted and more effective.

Mr. Justice DANIEL delivered the opinion of the court.

This is a certificate of division of opinion from the Northern District of New York.

The case is clearly and succinctly stated in the following abstract from the record:—

“At a Circuit Court of the United States, begun and held at Albany, for the Northern District of New York, in the

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Second Circuit, on the third Tuesday of October, in the year of our Lord 1848, and in the seventy-third year of American Independence.

Present, the Honorable Samuel Nelson and Alfred Conkling, Esquires.

“THE UNITED STATES OF AMERICA v. PETER MARIGOLD.

“State of the Pleadings.

“This is an indictment against the defendant, charging him, under the twentieth section of the act of Congress entitled ‘An act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes,’ approved March 3, 1825,

*566] “1st. With having brought into the United States, from a foreign place, with intent to pass, utter, publish, and sell as true, certain false, forged, and counterfeit coins, made, forged, and counterfeited in the resemblance and similitude of certain gold and silver coins of the United States, coined at the mint, he knowing the same to be false, forged, and counterfeit, and intending thereby to defraud divers persons unknown.

“2d. With having uttered, published, and passed such counterfeit coins, with intent to defraud, &c.

“To this indictment the defendant demurs, and George W. Clinton, attorney of the United States for the said district, who prosecutes in this behalf, joins in demurrer.

“This cause coming on to be argued at this term, the following questions occurred:—

“First. Whether Congress, under and by the Constitution, had power and authority to enact so much of the said twentieth section of the said act as relates to bringing into the United States counterfeit coins.

“Second. Whether Congress, under and by virtue of the Constitution, had power to enact so much of the said twentieth section as relates to uttering, publishing, passing, and selling of the counterfeit coins therein specified.

“On which said several questions, the opinions of the judges were opposed.

“Whereupon, on motion of the said attorney, prosecuting for the United States in this behalf, that the points on which the disagreement has happened may, during the term, be stated under the direction of the judges, and certified under the seal of the court to the Supreme Court, to be finally decided,—it is ordered, that the foregoing state of the pleadings, and statement of the points upon which the disagree-

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ment has happened, which is made under the direction of the judges, be certified, according to the request of the attorney, prosecuting as aforesaid, and the law in that case made and provided."

The inquiry first propounded upon this record points, obviously, to the answer which concedes to Congress the power here drawn in question. Congress are, by the Constitution, vested with the power to regulate commerce with foreign nations; and however, at periods of high excitement, an application of the terms "to regulate commerce" such as would embrace absolute prohibition may have been questioned, yet, since the passage of the embargo and non-intercourse laws, and the repeated judicial sanctions those statutes have received, it can scarcely, at this day, be open to doubt, that every subject falling within the legitimate sphere of commercial regulation *may be partially or wholly ex- [567
cluded, when either measure shall be demanded by the safety or by the important interests of the entire nation. Such exclusion cannot be limited to particular classes or descriptions of commercial subjects; it may embrace manufactures, bullion, coin, or any other thing. The power once conceded, it may operate on any and every subject of commerce to which the legislative discretion may apply it.

But the twentieth section of the act of Congress of March 3d, 1825, or rather those provisions of that section brought to the view of this court by the second question certified, are not properly referable to commercial regulations, merely as such; nor to considerations of ordinary commercial advantage. They appertain rather to the execution of an important trust invested by the Constitution, and to the obligation to fulfil that trust on the part of the government, namely, the trust and the duty of creating and maintaining a uniform and pure metallic standard of value throughout the Union. The power of coining money and of regulating its value was delegated to Congress by the Constitution for the very purpose, as assigned by the framers of that instrument, of creating and preserving the uniformity and purity of such a standard of value;¹ and on account of the impossibility which was foreseen of otherwise preventing the inequalities and the confusion necessarily incident to different views of policy, which in different communities would be brought to bear on this subject. The power to coin money being thus given to Congress, founded on public necessity, it must carry with it the correlative power of protecting the creature and object

¹ See *Legal Tender Cases*, 12 Wall. 580.

of that power.¹ It cannot be imputed to wise and practical statesmen, nor is it consistent with common sense, that they should have vested this high and exclusive authority, and with a view to objects partaking of the magnitude of the authority itself, only to be rendered immediately vain and useless, as must have been the case had the government been left disabled and impotent as to the only means of securing the objects in contemplation.

If the medium which the government was authorized to create and establish could immediately be expelled, and substituted by one it had neither created, estimated, nor authorized,—one possessing no intrinsic value,—then the power conferred by the Constitution would be useless,—wholly fruitless of every end it was designed to accomplish. Whatever functions Congress are, by the Constitution, authorized to perform, they are, when the public good requires it, bound to perform; and on this principle, having emitted a
 *568] circulating medium, a standard of value *indispensable for the purposes of the community, and for the action of the government itself, they are accordingly authorized and bound in duty to prevent its debasement and expulsion, and the destruction of the general confidence and convenience, by the influx and substitution of a spurious coin in lieu of the constitutional currency. We admit that the clause of the Constitution authorizing Congress to provide for the punishment of counterfeiting the securities and current coin of the United States does not embrace within its language the offence of uttering or circulating spurious or counterfeit coin (the term *counterfeit*, both by its etymology and common intendment, signifying the fabrication of a false image or representation); nor do we think it necessary or regular to seek the foundation of the offence of circulating spurious coin, or for the origin of the right to punish that offence, either in the section of the statute before quoted, or in this clause of the Constitution. We trace both the offence and the authority to punish it to the power given by the Constitution to coin money, and to the correspondent and necessary power and obligation to protect and to preserve in its purity this constitutional currency for the benefit of the nation. Whilst we hold it a sound maxim that no powers should be conceded to the Federal government which cannot be regularly and legitimately found in the charter, of its creation, we acknowledge equally the obligation to withhold from it no power or attribute which, by the same charter, has

¹ See *Id.*, 658.

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been declared necessary to the execution of expressly granted powers, and to the fulfilment of clear and well-defined duties.

It has been argued, that the doctrines ruled in the case of *Fox v. The State of Ohio* are in conflict with the positions just stated in the case before us. We can perceive no such conflict, and think that any supposition of the kind must flow from a misapprehension of one or of both of these cases. The case of *Fox v. The State of Ohio* involved no question whatsoever as to the powers of the Federal government to coin money and regulate its value; nor as to the power of that government to punish the offence of importing or circulating spurious coin; nor as to its power to punish for counterfeiting the current coin of the United States. That case was simply a prosecution for a *private cheat* practised by one citizen of Ohio upon another, within the jurisdiction of the State, by means of a base coin in the similitude of a dollar, —an offence denounced by the law of Ohio as obnoxious to punishment by confinement in the State Penitentiary. And the question, and the only one, brought up for the examination of this court was, whether this private cheat could be punished by the State authorities, on account of *the [*569 immediate instrument of its perpetration having been a base coin, in the similitude of a dollar of the coinage of the United States.

The stress of the argument of this court in that case was to show, that the right of the State to punish that cheat had not been taken from her by the express terms, nor by any necessary implication, of the Constitution. It claimed for the State neither the power to coin money nor to regulate the value of coin; but simply that of protecting her citizens against frauds committed upon them within her jurisdiction, and, indeed, as a means auxiliary thereto, of relying upon the true standard of the coin as established and regulated under the authority of Congress. In illustration of the existence of the right just mentioned in the State, and in order merely to show that it had not been taken from her, it was said that the punishment of such a cheat did not fall within the express language of those clauses of the Constitution which gave to Congress the right of coining money and of regulating its value, or of providing for the punishment of counterfeiting the current coin. It was also said by this court, that the fact of passing or putting off a base coin did not fall within the language of those clauses of the Constitution, for this fact fabricated, altered, or changed nothing, but left the coins, whether genuine or spurious, precisely as before. But this court have nowhere said, that an offence cannot be committed against the coin or cur-

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rency of the United States, or against that constitutional power which is exclusively authorized for public uses to create that currency, and which for the same public uses and necessities is authorized and bound to preserve it; nor have they said, that the debasement of the coin would not be as effectually accomplished by introducing and throwing into circulation a currency which was spurious and simulated, as it would be by actually making counterfeits, fabricating coin of inferior or base metal. On the contrary, we think that either of these proceedings would be equally in contravention of the right and of the obligation appertaining to the government to coin money, and to protect and preserve it at the regulated or standard rate of value.

With the view of avoiding conflict between the State and Federal jurisdictions, this court in the case of *Fox v. The State of Ohio* have taken care to point out, that the same act might, as to its character and tendencies, and the consequences it involved, constitute an offence against both the State and Federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each. We think this distinction
 *570] sound,¹ as we hold *to be the entire doctrines laid down in the case above mentioned, and regard them as being in no wise in conflict with the conclusions adopted in the present case.

We therefore order it to be certified to the Circuit Court of the United States for the Northern District of New York, in answer to the questions propounded by that court:—

1st. That Congress had power and authority, under the Constitution, to enact so much of the twentieth section of the act of March 3, 1825, entitled “An act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes,” as relates to bringing into the United States counterfeit coins.

2d. That Congress, under and by virtue of the Constitution, had power to enact so much of the said twentieth section as relates to the uttering, publishing, passing, and selling of the counterfeit coin therein specified.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of New York, and on the points or questions on which the judges of the said Circuit Court were opposed

¹ QUOTED. *Ex parte Siebold*, 10 Otto, 390.

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in opinion, and which were certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel. On consideration whereof, it is the opinion of this court,—1st. That Congress had power and authority, under the Constitution, to enact so much of the twentieth section of the act of 3d March, 1825, entitled “An act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes,” as relates to the bringing into the United States counterfeit coins; and 2d. That Congress, under and by virtue of the Constitution, had power to enact so much of the said twentieth section as relates to uttering, publishing, passing, and selling of the counterfeit coins therein specified. Whereupon, it is now here ordered and adjudged by this court, that it be so certified to the said Circuit Court.

***JOSEPH FORSYTH, PLAINTIFF IN ERROR, v. THE UNITED STATES. [*571]**

The Judiciary Act of 1789 made no provision for the revision, by this court, of judgments of the Circuit or District Courts in criminal cases; and the act of 1802 (2 Stat. at L., 156) only embraced cases in which the opinions of the judges were opposed in criminal cases. There is, therefore, no general law giving appellate jurisdiction to this court in such cases.¹

But the act of Congress passed on the 22d of February, 1847 (Sess. Laws, 1847, ch. 17) providing that certain cases might be brought up from the Territorial courts of Florida to this court, included all cases, whether of civil or criminal jurisdiction.²

Under this act, this court can revise a judgment of the Superior Court of the District of West Florida in a criminal case, which originated in October, 1845, and was transferred to the District Court of the United States for the Northern District of Florida.

Proceeding, therefore, to revise the judgment, this court decides that the jurisdiction of the Territorial courts, of which the Superior Court was one, ceased on the erection of the Territory into a State, on the 3d of March, 1845. The proceedings before the court in which the indictment was found were, consequently, *coram non judice*, and void.

THIS case was brought up, by a writ of error, from the District Court of the United States for the Northern District of Florida.

¹ CITED. *Ex parte Vallandigham*, 1 8 Cliff., 1.
 Wall., 251. S. P. *Ex parte Gordon*, ² See *Wiggins v. People of Utah*, 3
 1 Black, 508; *United States v. Plumer*, Otto, 466.

The facts in the case are sufficiently set forth in the opinion of the court.

Mr. Justice NELSON delivered the opinion of the court.

This is a motion by the Attorney-General, on behalf of the United States, to dismiss the writ of error for want of jurisdiction, it having been taken out in a criminal case to bring up a judgment on an indictment for cutting timber upon government lands.

The indictment was returned by the grand jury, at the October term, 1845, of the Superior Court of the District of West Florida, in the late Territory of Florida, in the County of Escambia, and was founded upon the act of Congress passed March 2, 1831, entitled "An act to provide for the punishment of offences committed in cutting, destroying, or removing live-oak and other timber or trees reserved for naval purposes."

The prisoner was arrested by a bench warrant issued upon the indictment on the 5th of November, 1845; but was taken out of the custody of the marshal by virtue of a writ of *habeas corpus*, issued from the Circuit Court of the State of Florida, at the November term, 1845, of that court, and discharged from the arrest.

He was afterwards arrested on an *alias* bench warrant, issued by the District Court of the United States for the Northern District of the State of Florida, on the 7th of February, 1848; and at the March term thereafter of the court was arraigned, and pleaded not guilty.

*Previous to the trial, a motion was made on behalf of the prisoner to quash the indictment, on the ground,—

1. That it was found in the late Superior Court of the District of West Florida by a grand jury impanelled at the October term, 1845, of said court, it being after the admission of the Territory of Florida into the Union as a State, and therefore that neither the court nor the grand jury thereof had jurisdiction over the offence, or authority to find the indictment.

2. That the act of Congress of March 2, 1831, under which the indictment was found, prohibited the cutting of timber only on land reserved for the use of the navy of the United States, and on none other.

This motion was denied, and the case ordered for trial.

The jury found the prisoner guilty, and assessed the value of the timber cut by him at sixty-one dollars. And thereupon the court pronounced judgment, that he be imprisoned for

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one day, and pay a fine of two hundred and fifty dollars, and the costs of the prosecution, which were taxed at \$299.27.

The proceedings before us have been brought up on a writ of error to this judgment; and the question is, whether there is any act of Congress conferring authority upon this court to review them in this form, or in any other.

The Judiciary Act of 1789 (1 Stat. at L., 73) made no provision for the revision of judgments of the Circuit or District Courts in criminal cases; and as the cases in which the appellate jurisdiction of this court can be exercised depend upon the regulation of Congress, it followed that no appeal or writ of error would lie. *United States v. Moore*, 3 Cranch, 159; 7 Wheat., 38; *Ex parte Kearney*, 3 Pet., 201.

The act of Congress passed 29th April, 1802 (2 Stat. at L., 156), which provided for a certificate to this court of the point, in case of a division of opinion in the Circuit Court, embraced cases in which the opinions were opposed in criminal as well as in civil trials; and since that act, questions of law in criminal cases have occasionally been the subject of examination here for the instruction of the courts below (*Id.*, p. 159, § 6). *United States v. Tyler*, 7 Cranch, 285; *The Same v. Wiltberger*, 5 Wheat., 76; *The Same v. Smith*, *Id.*, 153; *The Same v. Holmes*, *Id.*, 412; *The Same v. Mari-gold*, *ante*, p. 560.

There is no general law, therefore, upon which a revision of the judgment in this case can be maintained; and the only question is, whether, in a peculiar class of cases, to which this belongs, a writ of error is specially provided for by the act of Congress passed February 22, 1847 (Sess. Laws, 1847, ch. 17). *It is insisted, on the part of the plaintiff in error, that the case is embraced in the [*573 eighth section of that act.

It is an act entitled "An act to regulate the exercise of the appellate jurisdiction of the Supreme Court in certain cases." The previous sections of the act provide for the transfer of the records of the proceedings, including the judgments and decrees of all cases not appropriately belonging to State jurisdiction, pending in the Superior Courts or Court of Appeals, in the Territory of Florida, on the 3d of March, 1845 (the date of her admission into the Union), into the District Court of the United States for the State of Florida; and also for the hearing and decision of all cases on writs of error and appeals that had before been brought into the Supreme Court of the United States under any existing law, and which were pending here at the period above mentioned; and further, for the bringing of writs of error

and appeals in all cases of judgments and decrees which were pending at the period aforesaid, and were by the act transferred to the District Court, in which writs of error or appeals had not, but might have been taken to this court if the Territory had not been admitted into the Union.

The eighth section then provides, that in all cases pending in any of the Superior Courts of the Territory or Court of Appeals on the 3d of March, 1845, not legally transferred to the State courts, and which the said Territorial courts continued to take cognizance of, and proceeded to hear and determine after that day, and which were claimed as still pending therein as courts of the United States; and in all cases of a Federal character and jurisdiction commenced in said Territorial courts after that day, and in which judgments and decrees were rendered therein, the records and proceedings thereof, and the judgments and decrees therein, are hereby transferred to the United States District Court for the State of Florida; and writs of error and appeals may be taken by either party to remove the judgments or decrees that have been or may be rendered in such cases into the Supreme Court of the United States, and such court may hear and determine such cases on such writ of error or appeal, and issue its mandate to such District Court, with a proviso that the writ of error or appeal shall be taken within one year from the passage of the act, or from the rendition of the judgment or decree, and with the further proviso, that nothing in the act shall be construed as affirming or disaffirming the jurisdiction or authority of the Territorial judges to proceed in or to determine such cases after the 3d of March, 1845; but the same shall be referred to the Supreme Court for its decision in the matter.

*574] *We think it apparent, from this reference to the provisions of the act of 1847, that Congress, in respect to the peculiar class of cases particularly described in the eighth section, intended to give to either of the parties to the suit or proceedings the right to a revision by this court of the judgments or decrees rendered by the Territorial judges therein, without limitation as to the amount in controversy, or whether the case was of criminal or civil jurisdiction.

The previous sections had provided for the transfer of the records, judgments, and decrees into the United States District Court that had been rendered in the Territorial courts before the Territory was admitted into the Union, and were pending in those courts at the time of the admission; and in those cases the right of the party to bring up the judgments and decrees for revision on writs of error and appeals is

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specially restricted to those in which the right would have existed under the acts of Congress if the Territory had not been admitted into the Union,—in other words, if the Territorial system of government had continued. Under that system, the right of review by this court was limited to civil cases, and to those only where the amount in controversy exceeded \$1,000.

But we find no such restriction in the eighth section of the act, which provides for the transfer of the records and proceedings in cases in which the judgments and decrees were rendered in these courts after the Territorial system had become superseded by the erection of the Territory into a State. That section declares, that in all cases pending in the Superior Courts and Court of Appeals on the 3d of March, 1845, and which said courts continued to take cognizance of, and proceeded to determine after that day, and in all cases of Federal character and jurisdiction commenced in said courts after that day, and in which judgments or decrees were rendered, the records, &c., shall be transferred to the District Court; and writs of error or appeals may be taken by either party to remove the judgments or decrees, &c.

There can be no doubt but that the phraseology embraces all civil cases of the class mentioned; and we think it sufficiently comprehensive to include criminal cases also; and such was undoubtedly the object of the provision. Every part of the section shows that the principal design of providing for a revision of these proceedings was to procure the judgment of this court upon the question of jurisdiction of the Territorial judges after the erection of the Territory into a State; it having been insisted by the parties against whom the proceedings were had, that their judicial functions ceased with the Territorial *government. And in this [*575 view, the reason for including the criminal cases in the remedial law, of which these courts also took cognizance, is quite as strong as that which led to the provision in civil cases.

The peculiar situation of all the cases, civil and criminal, of which cognizance was taken after the termination of the Territorial government, and previous to the establishment of the Federal courts, was supposed to make this special provision expedient, in order that the question of jurisdiction might be settled speedily, and in a way most convenient for the parties and at the least expense. These considerations applied with peculiar force to the criminal cases in which convictions had taken place, as the prisoners were either

undergoing the punishment for their offences, or were subject to its infliction.

We are of opinion, therefore, that the court has jurisdiction of the case to revise the judgment of the court below on error, and that the motion to dismiss must be denied.

It was agreed by the counsel, on the argument of the motion to dismiss, that, if we arrived at the conclusion that the court had jurisdiction, under the act of 1847, to revise the judgment of the court below on error, we should proceed to examine the case upon the merits, and make a final disposition of the same.

We have, accordingly, looked into the record for this purpose, and find that the prisoner was indicted at the October term, 1845, of the Superior Court of the District of West Florida, in the late Territory of Florida. The session began on the 3d day of October, at which time a grand jury were drawn and impanelled and sworn; and that on the 3d day of November following, during the same term, they came into court and presented the indictment in question against the prisoner, which was then and there received and filed in the court.

The indictment contained two counts, charging, substantially, the same offence, namely, the cutting of timber trees then and there standing and being on the government lands, the said lands being other than those lands which, before that time, had been reserved or purchased, in pursuance of law, for the use of the United States for supplying and furnishing therefrom timber for the navy, with intent to dispose of the same, &c.

The indictment was afterwards transferred from the Superior Court, in which it was found, together with other papers in the cause, in pursuance of the act of Congress of 1847, to the District Court of the United States for the Northern District of Florida, and filed therein; and at the January term, 1848, of that court, held at Tallahassee, the cause was *576] docketed in said *court, and ordered for trial at the next term thereof, to be held at Pensacola on the first Monday of March next, notice of which order was given to the prisoner. At this term, as we have already stated, in disposing of the motion to dismiss, the prisoner was arraigned, tried, and convicted, after a motion had been made, and denied, to quash the indictment, on the ground that the court had no jurisdiction.

It will be perceived, that the proceedings were instituted in the Superior Court, in October, 1845, after the Territory of Florida was erected into a State, and the Territorial gov-

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ernment had ceased; and that, pending the indictment in that court, and before the trial, the cause was transferred to the District Court, in pursuance of the act of 1847, and there tried, and the prisoner convicted.

We have already held at this term, in the case of *Hiram Benner and others v. Joseph Y. Porter* (*ante*, p. 235), that the jurisdiction of these Territorial courts ceased on the erection of the Territory into a State, on the 3d of March, 1845; and, consequently, the proceedings before the court in which the indictment was found were *coram non judice*, and void.

Whether Congress possessed the power to confer afterwards upon the United States District Court jurisdiction to arraign and try the prisoner on this indictment, thus giving effect to it *ex post facto*, we need not stop to inquire, as the act of 1847 does not profess to confer any such authority. We have no doubt they possess no such power. An indictment upon which a prisoner can be held to answer must be found by a grand jury impanelled and sworn in pursuance of law, and before a court of competent jurisdiction.

The act of 1847 provided simply for the transfer of those cases pending in the Superior Courts, and which those courts claimed to exercise jurisdiction over after the Territorial government had ceased, to the Federal District Court of the State; and for writs of error or appeals to remove the judgments or decrees therein to this court for review, taking care, at the same time, to guard against any construction that might be given to the act tending to affirm the jurisdiction, but referring the question to this court to be determined.

Nor is there any provision in the eighth section conferring any special authority upon the District Court, in respect to criminal cases pending in the Superior Courts, the records and proceedings of which were directed to be transferred, to take up those that remained unfinished, and to proceed therein to trial and judgment. We refer to those criminal cases of which the Superior Courts took cognizance after the Territorial government ceased, and with it the jurisdiction of these courts.

*We do not doubt but that it was competent for Congress to have provided for the transfer of pending [*577 criminal cases, as well as civil, at the termination of the Territorial government, to the Federal courts, with authority to proceed therein to a final disposition, the same as if the cases had originated in those courts. A provision of this kind is not only fit and proper, but one that should always be made in respect to all the pending business remaining in the courts at the change of government.

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But the case here is different. The section relates to cases pending in the courts that had taken cognizance of them, and proceeded therein, after it is alleged their jurisdiction had ceased. And hence we find no provision for taking up the unfinished cases after the transfer, and proceeding in the same to a final disposition.

We are satisfied, therefore, that the District Court had no jurisdiction to arraign and try the prisoner on the indictment previously found in the Superior Court of the late Territory of Florida, or to pronounce judgment thereon, and that the judgment accordingly should be reversed, and the proceeding remitted to the court below, with directions to quash the indictment and discharge the prisoner from his recognizance, or imprisonment, as the case may be.

The act of Congress passed March 2, 1831 (4 Stat. at L., 472), upon which the indictment in this case is founded, has been before us at this term for consideration, in the case of the *United States v. Briggs*, and in which we have held that an indictment in all respects corresponding with the present one was well warranted by the provisions of that act. It makes the cutting of trees or timber standing on any lands belonging to the government, by any person, whether such lands be or be not reserved or purchased, in pursuance of law, for the use of the navy, with the intent to convert the same to his own use, a criminal offence, punishable by fine and imprisonment.

There is no distinction made between the acts of trespass in cutting the timber on lands reserved and not reserved for the use of the navy. Each is made a misdemeanour, and subjected to the same penalty. There is no ambiguity in the act in this respect, or room for a different interpretation. Had the question in this case turned upon the merits, we should not have entertained a doubt upon it, or have considered it open after the decision in the case already referred to.

The act of 1817 (3 Stat. at L., 347) was nearly as comprehensive as the one in question. The only difference is, that there the offence of cutting on lands belonging to the government other than those reserved for the use of the navy was *578] "limited to the cutting of live-oak or red-cedar timber; here it is enlarged to the cutting of live-oak or red-cedar trees "or other timber," thereby removing the restriction in the act of 1817. In other respects, the two acts are substantially the same.

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ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Florida, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby, reversed and annulled, for the want of jurisdiction in that court, and that this cause be, and the same is hereby, remanded to the said District Court, with directions to quash the indictment and discharge the prisoner.

EZEKIEL SIMPSON, PLAINTIFF IN ERROR, v. THE UNITED STATES.

In error to the District Court of the United States for the Northern District of Florida.

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error, under the eighth section of the act of Congress passed February 22, 1847, to bring up the judgment of the United States District Court for the Northern District of Florida for review.

The indictment upon which the prisoner was convicted was founded upon the act of Congress passed March 2, 1831, and the case, as appears from the record, agrees in all respects with the case of *Forsyth v. The United States*, just decided, and to the opinion in which we refer for our judgment in this case.

The motion on behalf of the Attorney-General to dismiss the writ of error for want of jurisdiction is denied, and the judgment of the court below reversed, and the proceedings remitted to the court, with direction to quash the indictment and discharge the prisoner from his recognizance, or imprisonment, as the case may be.

ORDER.

This cause came on to be heard on the transcript of the *record from the District Court of the United States for the Northern District of Florida, and was argued by counsel. On consideration whereof, it is now here ordered [*579 and adjudged by this court, that the judgment of the said

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District Court in this cause be, and the same is hereby, reversed and annulled, for the want of jurisdiction in that court, and that this cause be, and the same is hereby, remanded to the said District Court, with directions to quash the indictment and discharge the prisoner.

LOFTIN COTTON, PLAINTIFF IN ERROR, v. THE UNITED STATES.¹

In the preceding case of *Forsyth v. The United States*, this court decided that the act of Congress passed on the 22d of February, 1847 (Sess. Laws, 1847, ch. 17), gave jurisdiction to this court to review certain classes of cases brought up from the Territorial courts of Florida.

A motion to dismiss one of these cases, for want of jurisdiction, must be denied.

In error to the District Court of the United States for the Northern District of Florida.

Mr. Justice NELSON delivered the opinion of the court.

This is a motion on the part of the Attorney-General, to dismiss the writ of error for the want of jurisdiction.

The suit was brought by the United States against the defendant in the Superior Court of the District of West Florida, in the late Territory of Florida, for a trespass on government lands.

The declaration was filed in December term, 1844; and the plea of not guilty, in the vacation thereafter, on the 26th of March, 1845.

The cause remained pending in said court, or without any further proceedings therein, until the 15th of January, 1848, when the records and papers in the same were transferred to, and filed in, the United States District Court for the Northern District of Florida, in pursuance of the act of the 22d of February, 1847 (Sess. Laws, ch. 17, § 8), and at the January term of the court, 1848, held at Tallahassee, it was ordered that the cause be docketed and stand for trial at the next March term of the said court, to be holden at Pensacola, notice of which order was given to the defendant. At the March term, the defendant appeared, and on leave filed a

¹ See further decision, 11 How., 229.

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demurrer to the *declaration, which, after argument, was overruled, and the cause set down for trial on the [*580 plea of not guilty.

The jury found a verdict for the plaintiffs, and assessed the damages at \$362.50, for which sum judgment was rendered, besides costs.

Several exceptions were taken by the counsel for the defendant to the ruling of the court at the trial, which are found in the record, and on which he relies for a reversal of the judgment on this writ of error.

We have already held, in the case of *Forsyth v. The United States*, just decided, that a writ of error lies to the judgments in the peculiar class of cases described and provided for in the eighth section of the act of Congress passed 22d February, 1847, already referred to, without reference to the amount in controversy, and, as this case falls within that class, it follows that the court has jurisdiction to revise the judgment, and that the motion to dismiss must be denied.

The case not having been submitted by the counsel for a decision on the merits, as in the criminal cases just disposed of, it will remain on the docket for a hearing in its order.

JOHN BALDWIN, APPELLANT, v. CHARLES ELY.

Certificates were issued by the Treasury Department, under a treaty with Mexico, which were payable to a claimant or his assigns upon presentation at the Department.

These certificates being legally assignable under an act of Congress, an indorsement in blank by the original payee was always considered sufficient evidence of title in the holder to enable him to receive the amount of the certificate when presented to the Treasury Department for payment.

The possession of them with a blank indorsement is *prima facie* evidence of ownership.¹

Where a complainant in chancery alleged that they had been purloined from him, and the defendant alleged that he had received them from a third person in the regular course of business, the claim of the complainant, who furnished no proof that they had been purloined, to have them restored to him unconditionally, could not be maintained.

The bill was one of discovery, and the defendant, in his answer, alleged that he had received them from the third person as security for money loaned.

The complainant was entitled to have them restored to him upon his refunding to the holder the amount of the loan for which they had been deposited as security. It was error, therefore, in the court below to dismiss his bill.

But as the complainant did not offer to redeem the certificates, but insisted upon their unconditional restoration, the defendant below is entitled to costs

¹ CITED. *Coombs v. Hodge*, 21 How., 407.

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in the Circuit Court. But the plaintiff below, who was the appellant here, is entitled to his costs in this court.²

THIS was an appeal from the Circuit Court of the United States for the District of Columbia, in and for the County of Washington, sitting as a court of equity.

*581] *The facts were these.

The matters in controversy arose out of three certificates, No. 989, No. 990, No. 991, for \$1,000 each, bearing interest at the rate of eight per cent. per year, issued from the Department of the Treasury of the United States to the appellant, in pursuance of the convention of 11th April, 1839, between the United States and the Mexican republic, and two acts of the Congress of the United States to carry into effect that convention, passed June 12, 1840, and September 1, 1841.

Articles 1, 2, 3, 4, and 5 of that convention (8 Stat. at Large, pp. 526 to 533) provided for a commission to hear and determine the claims of the citizens of the United States upon the Mexican government.

By article sixth it was agreed that, if it should not be convenient for the Mexican government to pay at once in money the amount found due by the board of commissioners, it should be at liberty to pay in treasury notes, to bear interest at the rate of eight per cent. per annum from the date of the award, receivable at the maritime custom-houses of the republic.

By the seventh section of the act of June 12, 1840 (5 Stat. at L., p. 383), the Secretary of the Treasury was required to issue certificates "showing the amount or proportion of compensation to which each person, in whose favor award shall have been made by said commissioners or umpire, may be entitled as against the Mexican government, on account of the claims provided for by said convention."

By sections eighth, ninth, and tenth, the Secretary of the Treasury was required, if the Mexican government should pay any moneys towards satisfying the said awards, to distribute the same ratably among the claimants; or, if the Mexican government should see fit to issue treasury notes, then to cause the same to be delivered "to the persons who shall be respectively entitled thereto in virtue of the awards, and the certificates issued, first deducting such sums of money, if any, as may be due the United States from persons in whose favor awards shall have been made under said convention."

By the act of 1st September, 1841 (5 Stat. at L., p. 452), the Secretary of the Treasury was required to issue certificates

² See *Talty v. Freedman's Savings & Trust Co.*, 3 Otto, 325.

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to the persons authorized to receive the sums awarded, "their legal representatives and assigns," in the manner directed by the seventh section of the act of Congress of June 12, 1840, for such portions of the sums awarded as may be convenient for the claimants, and to be subject to the deductions provided for by the tenth section of said act; "provided, that nothing in this act shall be construed to give any rights to the *claimants that are not conferred by said convention, [582 and the act of June 12, 1840; and that the substance of this proviso be inserted in the certificates that may be issued."

The appellant, John Baldwin, obtained two awards from said commission for large sums of money, the one award bearing date 18th December, 1841, the other, 25th February, 1842; and therefor obtained various certificates from the Treasury Department for \$1,000 each, bearing interest at the rate of eight per cent. per year from the respective dates of said awards, whereof the aforesaid certificates, No. 989, No. 990, and No. 991, are parts and parcels.

Subsequent to the date of these certificates, another convention was signed at the city of Mexico, on the 30th of January, 1843, and finally ratified on the 29th of March, and promulgated on the 30th of March, 1843 (8 Stat. at L., p. 578), by which it was agreed, that the Mexican government should pay, on the 30th of April, 1843, all the interest which should be then due on the awards in favor of claimants; and that the principal, and the interest thereof accruing thereon, should be paid "in five years, in equal instalments every three months," the said term of five years to commence on the 30th of April, 1843; the payments to be made in the city of Mexico, in gold or silver, to such person as the United States should authorize to receive them.

Such were the effects, conditions, and obligations arising against the United States out of the afore-mentioned certificates.

In March, 1844, the appellant exhibited his bill in equity against the appellee, stating in substance, that, being the lawful proprietor of said three certificates, No. 989, No. 990, and 991, to him issued in pursuance of the awards in his favor, he wrote his name on the back thereof, "without any words of transfer or assignment, and still continued to hold the same as the lawful owner thereof; and that, while the same were thus held by him, the said three certificates, No. 989, No. 990, and No. 991, each for the sum of \$1,000, were either casually lost by him, or, as he verily believes, clandestinely stolen from his rightful possession."

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That upon the discovery of said abduction, the complainant immediately gave notice to the Treasury Department, by letter of 12th February, 1843, with a request that payment of those certificates might be stopped.

That the complainant was unable to find where those certificates were, until, by letter of the 29th of January, 1844, from the Secretary of the Treasury, he was notified they were held *583] and claimed by the defendant, and had been presented at the Treasury Department in the defendant's name. He sought a discovery of Ely's right to them, and prayed that Ely should be required to prove how the said certificates were procured from the complainant, and for what consideration, and when and where; that he be decreed to deliver up the same, and to desist from all demand of payment on account of the same, or to assign or transfer them to any other person or party; for an injunction to restrain him for demanding payment of them until the further order of the court, and for such other and further relief in the premises as might be agreeable to equity and good conscience.

The injunction was granted. Ely answered. He admits that the said certificates were issued and made payable to complainant or his assigns, and were his sole and exclusive property. He states, that in the month of April, 1842, one Perry G. Gardiner, of the city of New York, applied to him for a loan of money, and offered as security three certificates of the Mexican indemnity, similar to those referred to in the bill, issued to complainant, and indorsed by him; but he does not recollect the numbers; and upon these certificates he advanced to Gardiner at different times various sums of money, to the 8th of August, 1842, amounting to \$1,220, Gardiner promising to place further securities in his hand. On the 13th of August, 1842, Gardiner brought to him three other certificates for \$1,000 each, payable to Baldwin, and indorsed by him, the numbers of which he does not recollect, to be held as security for the sums already advanced, and such new loans as he might thereafter make. And he did afterwards, to the 16th of December, 1842, lend him other sums amounting to \$857, making in the whole \$2,077. That as to the first three certificates, they were, as he believes, the property of Gardiner; and as to the last, Gardiner, at the time of the deposit, informed him he had full control and right to sell, pledge, or hypothecate them; and he did verily believe that Gardiner was the true *bond fide* owner thereof, by regular assignment from Baldwin, and he took the same as he had taken the three previously given him, without any knowledge or suspicion of any fact or circumstance that could

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affect or invalidate the title of Gardiner to them. He further states on information and belief that Baldwin did in fact indorse the said three last-mentioned certificates in the presence of Gardiner, and hand them to Gardiner, with the express purpose and design that Gardiner should go into the market and negotiate the same, and apply the proceeds to his own use, in payment of moneys due and payable by Baldwin to him; and *he charges the fact to be, that [*584 Baldwin indorsed them with the express design and intention of passing, by such indorsement, a perfect title to Gardiner, or to any person to whom Gardiner might transfer them, and thus he gave this defendant the legal right to write over Baldwin's indorsement any words of assignment necessary to give him a perfect title to them; that some time in the month of December, 1842, Gardiner represented to him that the certificates had greatly increased in value, and that three of them would be sufficient security for him, and requested him to give up three of the six. He did so, without observing how they were numbered; and, some time after, Gardiner again applied to him to exchange the three certificates which he had so given up to him for the other three, and he, knowing no difference therein, received them back, and these three last are now in his possession, and are numbered 989, 990, 991. He denies all fraud, and claims them as his own.

To this answer the plaintiff filed a general replication.

A commission was issued to take testimony, and under it the evidence of James Bolton and George W. Riggs was taken for the complainant, and that of Perry G. Gardiner for the defendant.

The depositions of Bolton and Riggs need not be further mentioned, as they related chiefly to the exchange of certificates.

Gardiner states that Baldwin had passed to him in payment of a debt several certificates similar to these, three of which he had hypothecated with the defendant, for a loan of money made by defendant to him. And in August, 1842, Baldwin gave him the three certificates mentioned in the bill for the express purpose of raising money, or by hypothecation to pay him (Gardiner) for services rendered by him to Baldwin; that Baldwin took them out of his portfolio and indorsed them in his presence, and delivered them to him, and told him to get the money as soon as possible; that he took them directly to Mr. Ely, got some money on them, and he agreed to advance further sums, which he afterwards did advance; that he told Mr. Baldwin he had raised the money

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on these certificates. He states further, that in the month of December, 1842, he obtained from Mr. Ely the first three certificates, leaving the three mentioned in the bill in the hands of Mr. Ely, and sold them to Perkins Nicholls, a broker, and afterwards, 14th June, 1843, got them from E. Riggs, to whom Nicholls had sold them, and returned them to Ely. That Baldwin had advertised these three certificates as having been stolen from him, and witness called on him and *585] asked him the meaning of it. He said it was to *frighten Mr. Sayre and Mr. Allen, who held the five other certificates mentioned in the advertisement; that he would, as soon as he could raise the money, pay off Ely's advances, and take up the three certificates in controversy. Ely never has been paid.

The cause was set for hearing by consent on the bill, answer, exhibits, depositions, and general replication, and on the 25th of May, 1846, the Circuit Court passed the following decree:—

“This cause coming on to be heard on the bill, answer, and exhibits filed therein, and the complainant, by his counsel, objecting to the admissibility of the evidence of Perry G. Gardiner, whose deposition was taken in the said cause; and this court having heard the argument of counsel, and considered the said cause, the said objection to the admissibility of the said evidence is hereby overruled; and it is, this 25th day of May, 1846, ordered, adjudged, and decreed by the court, that the said bill be, and the same is hereby, dismissed, and that the complainant do pay to the said defendant his costs herein, to be taxed by the clerk of this court.”

From this decree the complainant appealed to this court.

It was argued by *Mr. Bibb*, for the appellant, and *Mr. Bradley*, for the appellee.

Mr. Bibb examined the case under two points of view.

1st. If Gardiner's testimony should be admitted.

2d. If it were excluded. (The argument under the first head is omitted.)

2. The deposition of Perry G. Gardiner must be considered by this court as suppressed for interest and incompetency, upon the exception taken to it in the Circuit Court.

The case of the defendant, divested of the deposition of the interested witness (Gardiner), is bald; his defence is without proof, and he stands before the court in no better condition than as a finder of these lost or purloined certificates.

The bill alleges the awards of the board of commissioners

in favor of the appellant, the issuing of these certificates to him in pursuance of the awards and the acts of Congress, and his possession thereof as of his own property. The answer admits those matters of the bill, but sets up matters by way of avoidance, to which the plaintiff put in the general replication. It behooved the defendant to make out by proof whatever was insisted on by way of avoidance. (Bull., N. P., 237.)

This is according to the established course in chancery. If the answer of a defendant, as to matter alleged by way of *avoidance, and after a general replication, were to be taken as true without proof, then a suit in equity would [586 be but little better than a mockery. Any hardened defendant, if not required to prove what he alleged in avoidance, could swear himself clear.

The appellee has no assignment to himself; he does not pretend to any thing more than that Perry G. Gardiner deposited the certificates as collateral security for money lent. Take away the deposition of the interested witness, Gardiner, and every matter set up by the defendant's answer in avoidance of the plaintiff's title to the certificates, issued to him, apparent on their face, and confessed by the answer, rests wholly in the allegation of the answer, without proof. The defendant is without proof that he lent Gardiner any sum, even a cent, upon these certificates. The defendant is without proof that he gave value for them, or how he came by them.

It appears from the depositions of Mr. Bolton and Mr. Riggs, that the possession of these certificates, now relied on by the defendant, must have been acquired on or after the 21st of June, 1843, after they were advertised by the appellant as having been lost or purloined, and after notice thereof had been given in the Department of the Treasury of the United States.

The defendant, in his answer, avers and charges, upon information which he believes to be true, "that the said complainant did in fact indorse the said three last-mentioned certificates," (meaning those which he says Gardiner delivered to the defendant on the 13th of August, 1842,) "in the presence of the said Gardiner, and hand the same to the said Gardiner for the express purpose and design that the said Gardiner should go into the market and negotiate the same, and apply the proceeds to the use of himself, the said Gardiner, in payment of moneys due and payable from said Baldwin to said Gardiner."

This matter, so alleged in avoidance, is totally without any

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color of proof, save in the deposition of the interested, discredited, incompetent witness, Gardiner himself.

The defendant further says, that he "is informed, believes, and expressly charges the fact to be, that the said Baldwin did indorse said certificates with the express design and intention of passing, by such indorsement, a perfect title to said certificate to the said Gardiner, and to any other person to whom the said Gardiner might afterwards transfer them." This allegation, like the former, is totally destitute of proof, without the deposition of this same interested, incompetent witness, Gardiner, who is swearing to saddle upon the appellant's property the debt of the witness to the appellee for *587] money borrowed, *and of which witness says, "I have never paid Mr. Ely any of the advances made by him on these certificates, and I am still indebted to him for them." Suppressing the deposition of this interested witness, as this court must do upon the exception taken to it in the court below, there is no delivery to Gardiner proved; no bargain, no contract, no consideration, between the appellant, Baldwin, and the witness, Gardiner. The complainant has never assigned them, never received any consideration for them, but charges (upon his oath to his bill of injunction) that these certificates, Nos. 989, 990, and 991, "were either lost by him, or, as he verily believes, stolen from his possession." The defendant alleges that the plaintiff delivered them to Gardiner, "in payment of moneys due from the said Baldwin to the said Gardiner." Take away the deposition of this interested, incompetent witness, Gardiner, and this allegation of the defendant is without proof, either of the delivery or of the consideration alleged.

The defendant "insists that said indorsement was intended to give, and does in law give, the right to this defendant, as the holder thereof, to write over the name so indorsed any words of assignment necessary or convenient to convey a perfect title to himself, and thus carry out the original design of said Baldwin in making such indorsements."

In this the defendant has pleaded and averred, first, an intention and design of the primitive owner of these certificates to transfer his property in them, which is a fact to be proved; secondly, that the original owner has signified his intention and design to transfer his right of property in a manner sufficient in law to effect a transfer.

In discoursing of these matters, to arrive at truth, the surest method is by proceeding from that which is exclusive and negative to that which is inclusive and affirmative. These certificates are not bills of exchange, nor any species

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of negotiable paper, ruled by the law merchant. They have none of those peculiar privileges allowed to paper negotiable, according to the law merchant, in order to give full effect to their utility as a medium of trade and commerce. These certificates have no resemblance to bills of exchange, or promissory notes made assignable by the statute of Anne "in like manner as bills of exchange." These certificates were payable out of a particular fund, to be furnished by the republic of Mexico to the United States from time to time; and, when so furnished, to be distributed among various claimants, *pro rata*, and subject to the condition expressed in the tenth section of the act of Congress of June 12, 1841. They were not assignable by the common *law. They cannot be transferred so as to vest an absolute property in the holder, [*588 exempted from all question of a consideration given for the transfer, like unto the privilege allowed to bills of exchange, of presumption of a sufficient consideration for the transfer when held by a third person,—a privilege allowed to such papers only as are governed by the law merchant, in order to strengthen and facilitate that commercial intercourse which is carried on through the medium of paper securities, properly denominated mercantile paper, negotiable according to the law merchant; or to such papers as by statute have been assimilated to bills of exchange in their assignable qualities.

The act of Congress of September 1, 1841, made in addition to that of 12th June, 1840, authorized the Secretary of the Treasury "to issue certificates to the persons authorized to receive the sums so awarded, their legal representatives and assigns," in the manner directed by the seventh section of the act of 12th June, 1840; that is, to the assignees of the awards, subject, however, to the conditions and reservations mentioned in both of those statutes. But neither of these statutes made the certificates themselves, when issued, assignable, much less assignable in like manner as bills of exchange. On the contrary, the tenth section of the act of 12th June, 1840, and the proviso of the act of 1st September, 1841, repel the idea that Congress intended to convert these certificates into a circulating medium, with assignable qualities, like unto bills of exchange.

They are therefore certificates, under the seal of the government, payable out of the particular fund when provided by the Mexican government, subject to conditions and reservations, having no peculiar privileges in the hands of an assignee beyond bonds at common law, payable to the obligee, his heirs, executors, administrators, and assigns, which are

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not made assignable by statute, but, like all bonds and other choses in action, are assignable in equity.

In the case of *Williamson v. Thomson, &c.*, 16 Ves., 443, it appears that David Thompson obtained from the East India Company, at their treasury in Bengal, certificates of deposit to entitle him to receive the money from the treasury of the company in England. These certificates were indorsed by said David, and remitted, with other funds, to his brother, George Thompson, with instructions to effect insurance on account of David on the property he had taken on board the ship Earl of Dartmouth, on his homeward voyage to England. Before the receipt of the letters in England said George be-
*589] came a *bankrupt. The ship Earl of Dartmouth was lost; David escaped, but died on board another ship, having previously published his will, appointing his brothers, George and William Thompson, executors, who obtained probate. The assignees of the bankrupt, George, got possession at the India house of all the letters addressed to said George Thompson, effected insurances, &c., and having obtained from the executor, George, his indorsement of the East India Company certificates, received the money, claiming it as of the effects of the bankrupt, George Thompson. Lord Chancellor Eldon determined that the property of the said David Thompson did not pass at law by his indorsement of the India certificates; and the said George having become a bankrupt, and the assignees having possessed themselves of all the papers, and there being no evidence of any specific appropriation by said David of these certificates, they did not pass in law or equity by the indorsement, but remained of the property and estate of the said David Thompson.

The decision in the case of *Glyn v. Baker*, 13 East, 509, was, that an India bond was not assignable. This was before the statute of 51 George III., ch. 64, which makes them assignable, and enables the assignee to sue in his own name. "A bare indorsement of a name transfers no property, and therefore, where the plaintiff produced the note with his own name indorsed, Lee, Chief Justice, suffered him to strike it out." Bull. N. P., 275.

The case of *Irvine v. Lowry*, 14 Pet., 298, 299, arose upon a note payable to Guy C. Irvine in bank notes, and indorsed with the name of Guy C. Irvine in blank.

This court decided that the paper was not negotiable, either by the usage and custom of merchants, the statute of Anne, or the kindred act of Pennsylvania. "It is not negotiable by indorsement, and not being under seal, it is not assignable by the act of Assembly on that subject relating to

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bonds. The bank, therefore, cannot sue in their name in virtue of the indorsement of Irvine in blank; nor could they sue if it was specially indorsed to them, because the legal right of action would still remain in Irvine, though the equitable right in the thing promised may have passed to the bank."

This decision is clear and conclusive to show that the mere indorsement of the name of Baldwin upon these certificates did not divest Baldwin of his legal right; and if any person other than Baldwin claims a right or interest in these certificates, it can only be an equitable right, growing out of a contract for a transfer founded upon valuable consideration paid to Baldwin *for his property therein, sufficient to raise a trust and use in equity in favor of such assignee. [*590]

That the assignee of a paper not negotiable according to the law merchant, nor made by statute negotiable in like manner as bills of exchange, cannot claim the privileges, remedies, and protection accorded to indorsees by the law merchant, but takes such paper at his peril, subject to all equities and infirmities of title, will appear by these decisions in the courts of law and equity. *Wheeler v. Hughes*, 1 Dall., 27, 28; *McCulloch v. Houston*, 1 Dall., 443, 444; *Drake v. Johnson*, Hard. (Ky.), 223; *Mandeville v. Riddle*, 1 Cranch, 298; *Jenny v. Herle*, 1 Str., 591; *Banbury v. Lissett*, 2 Str., 1212; *Peters v. Soame and Greene*, 2 Vern., 428; *Coles v. Jones and another*, 2 Vern., 692; *Turton v. Benson and others*, 2 Vern., 765. The cases of *Williamson v. Thomson*, 16 Ves., 443, decided by Lord Eldon, of *Theed v. Lovel*, Bull. N. P., 275, by Chief Justice Lee, and of *Irvine v. Lowry*, 14 Pet., 298, 299, by the Supreme Court of the United States, are insurmountable authorities establishing the principle "that the bare indorsement of a name transfers no property"; that the mere indorsement of John Baldwin's name in blank on these certificates did not divest him of his property in them, and transfer his right to another person.

An assignment to these certificates could be effected only by a contract, by an agreement to which John Baldwin was a party assenting,—by an agreement between him and another person or other persons, by which they formed an engagement between them, the owner, John Baldwin, assenting, upon valuable or good consideration to transfer his property in these certificates, and the other party assenting to accept the transfer and pay the consideration. An assignment so made would have been binding in equity; but a court of equity does not sanction a *nulum pactum* any more than a court of law.

The indorsement of his name upon these certificates issued

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to John Baldwin did not include a lawful right, a legal authority, to any finder or purloiner to write over that name whatsoever he pleased, and to transfer the property of John Baldwin thereby. An authority to transfer can be derived only from the assent of John Baldwin, signified lawfully and in some better manner than the simple production of his name indorsed in blank, without proof of any thing or circumstance, other than his name.

Men write their names upon blank leaves in their books to identify their rights of property in those books. As there are different men having the same names,—as, for example, several men named John Rogers, or John Scott, or John *591] Smith, or *John Anderson, or John Baldwin,—the name of the original proprietor, written by his own hand, may be of use in questions of property and identity of the owners between persons of the same name, or their representatives, because men are distinguished by their handwriting as well as by their faces; for it is very seldom that the shape of their letters agrees any more than the shape of their bodies. But it would be absurd to say, that a person who obtained possession, by finding or by purloining, of a book with the name of the owner written in blank on a blank leaf, thereby acquired an authority to write over the name a transfer of the right of property. And it would be ridiculously absurd to suppose, that, if a person cut such leaf out of a book, he, or any other person to whom he might deliver, thereby acquired a lawful right or authority to write over the name an assignment of a chose in action, or a bill of sale of a horse, or other property belonging to the person who had so written his name.

The bare writing of a name,—the bare indorsement of a name,—gives no authority, transfers no property, except only in certain peculiar privileged cases, ruled and governed by the law merchant, which is not applicable to these.

Chief Justice Holt said, the merchants of Lombard Street could not make nor unmake the law, and as often as they came into court upon promissory notes before the statute of Anne, declaring on them as bills of exchange, he nonsuited them. The brokers of Wall Street can no more transmute these certificates into bills of exchange, than the merchants of Lombard Street could convert promissory notes into bills of exchange.

Mr. Bradley, for the appellee, contended,—

I. That Gardiner was a competent witness. (That part of his argument is omitted.)

VI. But suppose we have failed to show that Gardiner is a competent witness, how stands the case then? We have the bill, answer, and depositions of Bolton and Riggs. By the former it is averred, and by the answer it is admitted, that these papers were once the property of Baldwin, and that he indorsed them; and the proof shows, that, with his indorsement, in the month of December, 1842, when they were worth only 25 per cent., they came in open market to the possession of Elisha Riggs, in New York, and were retained by him, or his agents, till the month of June, 1843. The complainant says they were stolen or lost. How, when, where, or by whom he does not suggest, but he did not discover the loss till February, 1843, and then gave notice at the Department, and that is all; and *he says they are now [*592 in the possession of the defendant, that he is remediless, save in this court, "to obtain a discovery of the right and title which said Ely possesses, or under which he claims, and that said certificates may be delivered up to your orator as obtained from him by fraud or theft; and he prays that said Ely may be required to prove and show how the said certificates were procured from your orator, and for what consideration, and when and where."

The case, then, is that of a man who puts his name on the back of a paper containing an obligation to pay money to himself, and which paper he seeks to recover from a third person who is holding and claiming it. He avers that it was lost or stolen, and he seeks to discover from the holder, and calls upon him to show and prove how, and for what consideration, and when and where, he became possessed of it.

The first question which naturally presents itself is, On whom is the burden of proof in the first instance?

It is said the paper is not negotiable, and possession does not import ownership. If the cases already cited are authority, it is evident that any person taking *bonâ fide* for a valuable consideration, and without notice, the papers thus indorsed, would thereby acquire a title to them. It may be true, that they stood on the same footing as promissory notes prior to the statute of 3 & 4 Anne, by which they were first made negotiable; but it has not been doubted for many years that the assignee of a chose in action has title to it. It is also an admitted principle in regard to such instruments, that, with the indorsement of the payee upon them, the title passes by delivery, if they were delivered with that intent; and it has been expressly ruled, that the holder would have a right to fill up the indorsement to himself. The difference, and the only essential difference, is, that the statute and the law

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merchant operating upon negotiable paper pass the legal title by indorsement and delivery, and dispense with proof of the consideration between the original parties for which it was passed. There is, then, nothing on the face of the papers to put the party on his guard, but every thing to show that Baldwin had parted with them voluntarily.

He avers that they were lost or stolen ; but as to the time, place, or circumstances of their disappearance, he is silent. He professes to have discovered the loss in February, 1843 ; yet it is clear, by his own proof, that they were out of his possession as early as the December previous. He had indorsed them ; but for what purpose, or when, he cannot say. In his bill, he says (p. 3), "Immediately on discovering the *598] said abstraction, *he notified the Treasury Department, by letter dated 12th February, 1843," and in his affidavit he says (p. 57), that "some time in the year 1842 there was lost, mislaid, or purloined from my possession, three certificates of the Treasury of the United States for Mexican indemnity, numbered as follows, viz. 989, 990, 991, which were advertised in the Madisonian for six consecutive weeks during the months of May and June, 1843," &c. These are all the facts stated and relied on as evidence of notice.

Not a tittle of proof is afforded by him of these pretended facts. They are not admitted in the answer. He was therefore bound to prove them, if they are at all material to his case.

The answer denies, in the most explicit terms, the fact of the loss. He was, therefore, bound to prove it, more especially if, by his indorsement, he authorized a *bonâ fide* holder to write an assignment over it. *Clarke's Ex. v. Van Riemsdyk*, 9 Cranch, 153 ; *Hughes v. Blake*, 6 Wheat., 453 ; *Carpenter v. Providence Insurance Company*, 4 How., 185 ; *Young v. Grundy*, 6 Cranch, 51.

The answer admits that the papers once belonged to the complainant, but that does not dispense with his proving that he lost them. It is not matter in avoidance. The papers themselves, being indorsed by the complainant, and in the possession of a third party, are *primâ facie* evidence of his having parted with them voluntarily, and the answer insists he did so part with them. This, after any proof of the loss, would be matter in avoidance, but not without such proof. It would be the same in the case of a negotiable instrument. The answer must admit that the note was delivered to the party to whom it was payable, and by whom it was indorsed. His indorsement and delivery in the one case imports a consideration ; in the other, it leaves open the question of con-

sideration, as between the original parties to the paper, but it does not admit any thing more; it does not admit that it was lost or stolen, or parted with by the payee without consideration.

However that may be, the answer in this case is explicit, denies the loss set up by the complainant, and puts him to the proof. This is the gist of the whole matter, and the complainant having failed in this, his bill must be dismissed.

VII. But it is said these certificates, like those in the case of *Williamson v. Thomson*, 16 Ves., 448, are not assignable at law, and did not pass in law or equity, by the indorsement, but remained the property of Baldwin, as those did of Thompson. It is sufficient to say of that case,—1st. That it does not *establish the principle for which it is cited; 2d. It was decided on its peculiar facts. The substance is, [*594 that David Thompson, the owner and holder, indorsed them and forwarded them in letters to his brother George, who was his general agent in England, and died. George became bankrupt, and the assignees took possession of all his effects, among others, of the letters accompanying these certificates, and the certificates themselves, procured the indorsement of George upon them, and received the money. The representatives of David claimed them, and proved these facts. The assignees did not produce the letters, and relied on the indorsement. The master found that, by reasons of the assignees' taking possession of these letters, &c., it could not be ascertained whether the sums payable by the said certificates and bill were appropriated, or intended to be appropriated, to any particular purpose, &c. (p. 447.) And the court say, "Unless the legal effect of the circumstances stated by the trustees' report is, that these certificates became the property of the bankrupt, this court is called upon to make this declaration, upon the intention to appropriate them, and whether the act of the assignees, or, as is much more probable, the act of the bankrupt himself, has prevented the court seeing what was the appropriation intended, every thing is to be inferred that can be inferred against them." This case, then, does not touch the principle, that, without other circumstances, the possession of an assignable instrument indorsed by the assignee is *prima facie* evidence that he has voluntarily parted with it.

The case of *Irvine v. Lowry*, 14 Pet., 298, does no more than affirm the principle, that a suit at law to recover a chose in action must be in the name of the payee or obligee, in whom the legal title still remains, unless there be an enabling statute changing the common law, while it affirms the propo-

sition that the bond, bill, or note passes by indorsement and delivery. The other cases relied on in the argument go no further, unless it be to show that the assignee of a chose in action takes it subject to the equities subsisting between the original parties.

But it is said the "assignment could be effected only by a contract, by an agreement to which Baldwin was a party assenting, upon a valuable consideration, to transfer his property in these certificates, and the other party assenting to accept the transfer and pay the consideration." And it is admitted, that "an assignment so made would have been binding in equity." This is conceding the whole question, and retracting all that precedes it. We are in equity. It is a question of evidence. The bare indorsement of negotiable *595] paper does not transfer the title. It must be accompanied or followed by delivery. So of a chose in action, the fullest words of assignment do not transfer the title. There must be a delivery. In the former case, the negotiable paper, possession is evidence of delivery. In the latter case, the possession by the assignee is as strong *prima facie* evidence. But, if the indorsement of his name by the payee, and a delivery to a third person, will authorize that person to fill up the assignment in the name of the payee, and thus as effectually transfer the title as if it were first filled up by the assignee before delivery, can there be a question that the possession of such a paper, with a blank indorsement, is *prima facie* evidence of delivery?

The questions are, What is the form of an assignment, and how must it be evidenced? There is no precise form. It may be by delivery. *Briggs v. Dorr*, 19 Johns. (N. Y.), 96, citing numerous cases; *Onion v. Paul*, 1 Har. & J. (Md.), 114; *Dunn v. Snell*, 15 Mass., 485; *Titcomb v. Thomas*, 5 Greenl. (Me.), 282. True, it is said it must be on a valuable consideration, with intent to transfer it. But these last are requisites in all assignments, or transfers of securities, negotiable or not. It may be by writing under seal, by writing without seal, by oral declarations, accompanied in all cases by delivery, and on a just consideration. The evidence may be by proof of handwriting and proof of possession. It may be proved by proving the signature of the payee or obligee on the back, and possession by a third person. 3 Gill & J. (Md.), 218.

It is a question of authority, the authority dependent on the act and intent. When a man delivers to another a blank piece of paper, of convenient and proper size for a promissory note, with his name signed in that part where the signature

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to a promissory note ordinarily appears, and the holder fills it up with a promise to himself, the authority to do so is immediately implied from these acts. When he writes his name across the middle of such a piece of paper, and the holder writes a promissory note, payable to him or order, on the other side, the fair presumption is, that he intended this as the consequence of his act.

It is a question of delivery; he is the holder of these certificates. He assigns no reason for, or time, place, or circumstance of or attending his doing so, but he indorses these three certificates. Why indorse these three? Where was he when he indorsed them? Where did he keep them? When did he lose them? Where? Who saw them? Can he afford no clue to trace how, when, where, under what circumstances, all or any of these things occurred? And what steps did he take? He tells *us at one time, that immediately on discovering his loss he gave notice at the Department. Then [*596 he took advice of counsel. Could he not prove these facts? But what else? In his affidavit he says they were stolen in the year 1842, and he advertised them in May and June, 1843, six months after their loss, and three months after his discovery of that loss. Are these the acts, is this the conduct, of a man who has really sustained a loss of three thousand dollars? Yet even of this he gives no proof. Did he lose them? He has failed to prove a fact or circumstance from which the loss can be inferred; they are in the possession of a third party. Must he not have delivered them?

But if we err in supposing the burden of proof is on him to show the loss, or that he has in fact made a *primâ facie* case of loss, and if we are wrong in supposing the indorsements made by him are *primâ facie* evidence of his having voluntarily parted with them, and cannot now reclaim them, we say,—

Finally, this is a bill for discovery and relief. The complainant was not satisfied with setting up his loss, but he calls for a discovery of the right and title which said Ely possesses, or under which he claims! So far as this discovery is made through the answer, the answer is responsive to the bill, and is evidence of the facts stated in it. This, therefore, makes evidence all that part of the answer which states the transactions between the defendant and Gardiner. It is, then, clear that the defendant became the holder of the certificates indorsed by complainant *bonâ fide*, without notice, on a just consideration, as the property of Gardiner. The complainant himself has proved that Elisha Riggs bought them from Perkins Nicholls, a broker in the city of New York, and sent them to the house of Corcoran & Riggs; and further, in his

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bill he sets up that they will be paid at the Treasury Department on the 5th of February, unless restrained by the injunction of the court. He has therefore clearly shown, not only that they passed by delivery among brokers and others, but that the holder with this indorsement upon them was recognized at the Treasury Department as owner. Mr. Ely, then, acted but as other prudent men would have acted, in giving credit to this indorsement. Here the complainant himself has recognized its force by stopping the payment. It follows that, by his voluntary indorsement and his negligence, the defendant has been induced to part with his money. But for those indorsements, Gardiner could not have obtained the money; and but for the want of care of Baldwin in preserving his papers, Gardiner could not have presented them to Ely. *597] *Volenti non fit injuria*. That *he knew the consequences of his indorsement if he passed the papers is apparent from his whole conduct. It would otherwise have been but a snare for the most wary. He now comes into a court of equity to be relieved from the consequences of his own negligence. Can he have relief until he does equity? Was not the court below bound to dismiss his bill unless he offered to redeem a mortgage thus created by his want of care?

I have avoided any discussion of much that is relied on on the other side, thinking that a general summary may suffice to correct some of the most material errors of fact and erroneous deductions which are apparent in the argument.

Mr. Ely states that he made his first advance in April, 1842, upon three certificates, the numbers of which he does not recollect, and afterwards made further advances on promises of additional security. On the 13th of August, 1842, Gardiner deposited with him three other certificates, and received further advances to the 16th of December, 1842, when the whole sum was \$2,077; that some time in or about that month Gardiner called and represented to him that the certificates had become much more valuable in consequence of the arrangements then recently perfected between the United States and Mexico, and requested him to let him withdraw three of the six he had deposited. He does not state, as is supposed in the argument for complainant, that such arrangements had been made, but that Gardiner told him so. Gardiner may have stated what was not the fact, but that does not affect Mr. Ely. He further says, that, some time after that, Gardiner again applied to him to exchange them -- that is, the three which he had thus received from Ely -- for those then held by Ely, and he, knowing no difference, assented to it,

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made the exchange, and the three he then received are those now in controversy. It is, then, evident that he had these three certificates as early as April, 1842, or certainly as early the 13th of August, 1842. Yet Baldwin does not discover the loss, according to his statement, till February, 1843. There is, then, in all this nothing in the remotest degree to raise a doubt of the entire fairness of Mr. Ely in the matter. It is said that Riggs and Bolton prove this last exchange to have been made as late as the 14th of June, 1843, and after the certificates had been advertised as stolen. But we have already shown there is not a particle of proof in the cause of any such advertisement, or other notice, having at any time been given by Baldwin. There is nothing from which it can be inferred that Ely had any ground to suspect the title; they were the same certificates he had held nearly a year before, and the very papers indorsed by the complainant on *which he had lent the money, which has not been [*598 repaid to him to this day.

Mr. Chief Justice TANEY delivered the opinion of the court.

This case is brought here by appeal from the decision of the Circuit Court for the District of Columbia for the County of Washington, sitting as a court of chancery.

The appellant filed his bill in that court, stating that large sums of money were awarded to him under the convention with Mexico, for which he obtained certificates, payable to him or his assigns, from the Treasury Department, according to the act of Congress of September 1, 1841. That among these certificates were three for one thousand dollars each, numbered 989, 990, and 991; that upon the back of these certificates, among others, he wrote his name, but without any words of transfer or assignment, and continued to hold them as the lawful owner; and that while he thus held them, the said three certificates were either casually lost by him, or, as he verily believed, purloined or stolen. He states further, that upon discovering their loss he gave notice of it to the Secretary of the Treasury, who agreed to suspend payment in case they should be presented, until an opportunity should be afforded him to regain possession of them, or to assert his right by some legal proceeding, but that he had been unable to discover where these certificates were, or who held them, until a short time before the bill was filed, when he received notice from the Department, that they had been presented for payment on behalf of the appellee, and would be paid accordingly, unless sufficient grounds for refusing

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should be furnished by the appellant; and that as the appellee resided out of the District of Columbia, and his agent was a member of Congress, and therefore not liable to arrest, he was without remedy except by the aid of the court to obtain a discovery of the right and title which Ely, the appellee, possessed, or under which he claimed; and prayed that he might be required to prove and show how the certificates were procured from the appellant, and for what consideration, and when and where, and to produce them before the court, and be compelled by its decree to deliver them to the complainant.

The appellee appeared and put in his answer, in which he states that these certificates, indorsed in blank by the appellant, were delivered to him by a certain Perry G. Gardiner, to be held as security for loans and advances previously made by the appellee to the said Gardiner, and also for such further loans and advances as he might thereafter make. He further states, that he afterwards made sundry advances, which he *599] particularly *mentions, and that he has altogether advanced to Gardiner two thousand and seventy-seven dollars, for which he holds these certificates. He further states, that, at the time he took them, he believed, from Gardiner's representations, that he was the owner, and had no knowledge or suspicion of any circumstance that could invalidate his title. And further, that he is informed, and believes, and charges, that they were indorsed with the express intention of passing by such indorsement a perfect title to Gardiner, and handed by the appellant to him, that he might go into the market and negotiate them, and apply the proceeds in payment of a debt due from Baldwin to him.

The transactions between the appellee and Gardiner are set out in the answer much more particularly and in detail than is here stated, and a great portion of it is taken up in stating a transaction between him and Gardiner concerning a pledge of other certificates, upon which a large portion of the advances now due were originally made, and explaining how these three certificates became finally pledged for the whole amount loaned by the respondent, and the others released. But it is unnecessary to state these particulars here, because we see nothing in the case to impeach the fairness and good faith of the appellee, and the summary above given is sufficient to show the issues upon which this controversy must be decided.

Gardiner was examined as a witness on the part of the appellee, and sustains in every respect the statement in the answer. But his testimony is objected to by the appellant,

first, upon the ground that he is interested, and therefore incompetent; and secondly, that if he is competent he is not worthy of credit. It is not necessary to express an opinion upon the validity of either of these objections, for the admission or rejection of his testimony would not change the equity of the case.

Putting aside, therefore, the testimony of Gardiner, it appears from the bill and answer that the appellee is in possession of these certificates, claiming title to them as assignee. The act of Congress directs that such certificates shall be made payable to the person entitled under the award of the commissioners, his legal representatives or assigns, and the certificates in question were issued in conformity to the law, and made payable to the party, his legal representatives or assigns, upon the surrender of the certificates at the Department. They are therefore legally transferable by assignment, and no particular form of assignment is prescribed. The certificates in question were indorsed in blank by the appellant, and that indorsement would be altogether useless and unmeaning, unless made for the purpose of transferring the property to an assignee, and authorizing *any person entitled to it in that character to write over his [*600 name a formal and regular assignment, if it should become necessary, or he should deem it his interest to do so. The holders of certificates of this description, thus indorsed in blank, have always been recognized at the Treasury Department as assignees, without any formal assignment, and the money due on the certificate paid to them, except only when doubts were entertained of the genuineness of the indorsement, or notice given that the title of the holder was disputed. Neither the law nor the usages of the Department require that the indorsement or assignment should be attested by a witness.

There is nothing, therefore, in the form and character of the indorsement calculated to awaken suspicion that the appellee had obtained them unfairly. The handwriting of the appellant is admitted, and the indorsement is according to the usage sanctioned by the Department at which they are to be paid. His possession, therefore, upon established principles of law, is *prima facie* evidence that he is entitled to the property until the contrary appears. A different rule would put in jeopardy the title to a great portion of this scrip, which has been fairly purchased for a valuable consideration. For it has been a common article of traffic, and much of it has passed through a variety of hands, with no other evidence of an assignment to the holder but the indorsement in blank of the original payee. We do not mean to say that

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these certificates are to be regarded as commercial instruments, to be regulated by the commercial law, and that the holder is entitled to all the rights which belong to a *bona fide* indorsee of a promissory note. He certainly is not. They are, however, property, and the legal right to them may, under the act of Congress, be transferred to another, like the right to any other property. And the possession of them by the appellee, with the customary form of assignment indorsed upon them, in the handwriting of the party to whom they were originally issued, entitles him to the benefit of the legal presumptions in favor of his right which always arise from possession, until proof is offered to the contrary.

Now the appellant offers no proof that the certificates were lost or stolen, as charged in his bill, nor any proof that they remained in his possession after he indorsed them, nor any evidence that the indorsement was made for any other purpose than that which it imports; that is, for the purpose of transferring it to another person.

It is true, that it appears from the testimony of witnesses to whom there can be no objection, that these certificates were advertised by the appellant, as having been improperly *601] obtained *from him, and that his advertisement appeared in some newspaper before they were pledged the second time to Ely. But the advertisement is no evidence of the fact stated in it, and there is no reason to believe that it came to the knowledge of the appellee before the last transaction between him and Gardiner. And if Gardiner's testimony is rejected, there is no evidence in the case to support the allegations in the appellant's bill, nor any ground upon which he can entitle himself to the relief he asks for.

Besides, the object of the appellant's bill is for discovery as well as relief, and to obtain from the appellee a discovery of the right and title which he possesses, or under which he claims. The answer, therefore, is responsive to the bill, when it states the transactions with Gardiner, and the circumstances under which he received the certificates, and the advances he made upon them. And it is entitled to all the weight which the rules of equity give to an answer when it is responsive to the bill, and speaks of facts within the personal knowledge of the respondent.

The case of *Williamson v. Thomson*, 16 Ves., 442, relied on by the appellant, depended on different principles. The East India certificate in dispute in that case was not by law assignable, and the order indorsed upon it by the party to whom it was issued, to pay the amount to another, did not transfer the legal right to the money. It might pass the

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equitable title, if so intended, but nothing more. The decision turned upon the meaning and intention of the indorsement. The Court of Chancery was called upon to expound it, and to determine, from the evidence, whether it was intended as a transfer of the equitable right, or as an authority merely to receive the money as the agent of the original payee, and for his use. The court determined that he took it in the latter character, but upon evidence which presented a case altogether unlike the one now before us.

The decree of the Circuit Court dismissing the bill cannot, however, be sustained. The appellee admits that he did not purchase the certificates from Gardiner, but took them as security for the money loaned. Consequently, the appellant is entitled to redeem, upon payment of the advances stated in the answer, with interest upon the several sums from the time they were respectively loaned. The decree of the court below must therefore be reversed, with the costs in this court, and the case remanded, with directions to cause an account to be stated in conformity to this opinion, and to pass a decree requiring the certificates to be delivered to the appellant, upon his *paying or tendering to the appellee the [*602 amount found to be due, and in case the money is not [*602 paid or tendered by a day to be fixed by the Circuit Court, then the certificates to be sold, and the proceeds apportioned between the parties in the manner herein directed.

In taking the account, the appellee is to be allowed the whole amount of the loans and advances to Gardiner, for which these three certificates were ultimately left in pledge. And as the appellant did not offer to redeem them, and insisted on their absolute re-delivery to him, the court think that, under the circumstances as they appear in the record, the appellee is equitably entitled to his costs in the Circuit Court, and they are accordingly in the account to be charged against the appellant. But as regards the costs in this court, the appellant, by the established rules and practice of the court, is entitled to recover them, and they must be charged against the appellee.

A mandate will be issued to the Circuit Court in conformity with this opinion.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed

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by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs for the appellant in this court, and that this cause be, and the same is hereby, remanded to the said Circuit Court, with directions to that court to proceed therein in conformity to the opinion of this court, and as to law and justice shall appertain.

SMITH HOGAN, ARTHUR S. HOGAN, AND RICHARD Y. REYNOLDS, PLAINTIFFS IN ERROR, v. AARON ROSS, WHO SUES FOR THE USE OF ROBERT PATTERSON.¹

Where no citation had been issued or served upon the defendant in error, the cause must be dismissed on motion

THIS case was brought up, by writ of error, from the District Court of the United States for the Northern District of Mississippi.

*603] *The order of the court explains the ground of its dismissal, upon the motion of *Mr. Coxe*.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Mississippi, and on the motion of Richard S. Coxe, Esquire, of counsel for the defendant in error, stating that no citation had been issued or served upon the defendant in error, was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that this cause be, and the same is hereby, dismissed, with costs.

JOSEPH FLEMING AND WILLIAM A. MARSHALL, TRADING UNDER THE FIRM OF FLEMING & MARSHALL, v. JAMES PAGE, COLLECTOR OF THE UNITED STATES.

During the war between the United States and Mexico, the port of Tampico, in the Mexican State of Tamaulipas, was conquered, and possession of it held by the military authorities of the United States, acting under the orders of the President.

¹ See further decision, 11 How., 294.

The President acted as a military commander prosecuting a war waged against a public enemy by the authority of his government, and the conquered country was held in possession in order to distress and harass the enemy.

It did not thereby become a part of the Union. The boundaries of the United States were not extended by the conquest.

Tampico was, therefore, a foreign port, within the meaning of the act of Congress passed on the 30th of July, 1846, and duties were properly levied upon goods imported into the United States from Tampico.¹

The administrative departments of the government have never recognized a place in a newly acquired country as a domestic port, from which the coasting trade might be carried on, unless it had been previously made so by an act of Congress; and the principle thus adopted has always been sanctioned by the Circuit Courts of the United States, and by this court.

THIS case came up from the Circuit Court of the United States, for the Eastern District of Pennsylvania, on a certificate of division in opinion between the judges thereof.

It was an action brought by Fleming and Marshall against Page, collector of the port of Philadelphia, in one of the State courts of Pennsylvania, in 1847, to recover back certain duties on goods, wares, and merchandise, imported into the port of Philadelphia from Tampico, in Mexico, in March and June of that year. The case was afterwards, in 1848, taken into the Circuit Court of the United States for the Eastern District of Pennsylvania, and was tried May term, 1849, when the jury found for the plaintiffs. A motion was thereafter made, on *behalf of the United States, to set aside [*604 the verdict, and for a new trial, on the grounds,—

1st. That the learned judge erred in charging the jury that, in the year 1847, Tampico was not a portion of a foreign country within the meaning of the first section of the act of Congress of the United States passed 30th July, 1846, entitled "An act reducing the duties on imports, and for other purposes."

2d. That the learned judge erred in charging the jury that, in the year 1847, Tampico was so far under the dominion of the United States, that goods, wares, and merchandise imported from that port into Philadelphia, in March and June of that year, were not subject to the payment of duties.

3d. That the learned judge erred in charging the jury that, upon the facts in evidence, the plaintiffs were entitled to a verdict for the amount of duties paid under protest on the 15th of June, 1847, on merchandise imported in the schooner Catharine, from Tampico, into the port of Philadelphia, in March and June, 1847.

And the following case was stated for the opinion of the court:—

¹ See *Thorington v. Smith*, 8 Wall., 10.

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"This action is brought by the plaintiffs, merchants, residing in the city of Philadelphia, against the defendant, the late collector of the port of Philadelphia, to recover the sum of one thousand five hundred and twenty-nine dollars, duties paid on the 14th of June, 1847, under protest, on goods belonging to the plaintiffs, brought from Tampico while that place was in the military occupation of the forces of the United States.

"On the 13th of May, 1846, the Congress of the United States declared that war existed with Mexico. In the summer of that year, New Mexico and California were subdued by the American armies, and military occupation taken of them, which continued until the treaty of peace of May, 1848.

"On the 15th of November, 1846, Commodore Conner took military possession of Tampico, a seaport of the State of Tamaulipas, and from that time until the treaty of peace it was garrisoned by American forces, and remained in their military occupation. Justice was administered there by courts appointed under the military authority, and a custom-house was established there, and a collector appointed, under the military and naval authority.

"On the 29th of December, 1846, military possession was taken by the United States of Victoria, the capital of Tamaulipas; *garrisons were established by the Americans *605] at various posts in that State; and, at the period of the voyages from Tampico of the schooner Catharine, hereinafter mentioned, Tamaulipas was reduced to military subjection by the forces of the United States, and so continued until the treaty of peace.

"On the 19th of December, 1846, the schooner Catharine, an American vessel chartered by the plaintiffs, cleared coastwise from Philadelphia for Tampico.

"On the 13th of February, 1847, she was cleared at the custom-house at Tampico, on her return voyage to Philadelphia, under a coasting manifest, signed by Franklin Chase, United States acting collector.

"The Catharine brought back a cargo of hides, fustic, sarsaparilla, vanilla, and jalap, the property of the plaintiffs, which was admitted into the port of Philadelphia free of duty. The Catharine cleared again coastwise from Philadelphia for Tampico, on the 18th of March, 1847, and in June, 1847, brought back a return cargo of similar merchandise, owned by the plaintiffs, which the defendant, acting under the instructions

of the Secretary of the Treasury, refused to admit, unless the duties on the merchandise brought by the Catharine on her former voyage were paid, as well as the duties on the goods brought by her on this voyage.

"Thereupon, the plaintiffs, on the 14th of June, 1847, paid under protest the duties on both voyages, amounting to \$1,529, and brought this action to recover back the money so paid.

"The question for the decision of the court is, whether the goods so imported by the Catharine were liable to duty. If the court are of opinion that they were not so liable, then judgment is to be entered for the plaintiffs, for the sum of \$1,529, with interest from the 14th of June, 1847.

"If they are of opinion that they were liable to duty, then judgment is to be entered for the defendant.

"It is agreed, 'that all instructions from the several departments of the government to any of its officers, and all documents of a public nature, touching the war with Mexico or our relations with that country, which either party may desire to bring to the attention of the court, shall be considered as if made part of this case.'

"McCALL, for Plaintiffs.
ASHMEAD, for Defendant."

The cause having come on to be argued on the case stated, the judges of the Circuit Court were opposed in opinion on the following point:—

*"Whether Tampico, in the year 1847, while in the military occupation of the forces of the United States, [*606 ceased to be a foreign country, within the meaning of the first section of the act of Congress passed 30th July, 1846, entitled, 'An act reducing the duty on imports, and for other purposes'; so that goods, wares, and merchandise of the produce, growth, and manufacture of Mexico, or any part thereof, imported into the port of Philadelphia from Tampico, during said military occupation, were not subject to the payment of the duties prescribed by the said act, but entitled to be entered free of duty as from a domestic port."

The first section of the act of 30th July, 1846, above referred to, is as follows:—

"That from and after the first day of December next, in lieu of the duties heretofore imposed by law on the articles hereinafter mentioned, and on such as may now be exempt from duty, there shall be levied, collected, and paid, on the goods, wares, and merchandise herein enumerated and provided for, imported from foreign countries, the following rates of duty," &c. Session Laws, Statutes at Large, 42.

Upon the above certificate of division in opinion, the case came up to this court.

It was argued by *Mr. McCall* and *Mr. Webster*, for the plaintiffs, and by *Mr. Johnson* (Attorney-General), for the defendant.

Mr. McCall, for the plaintiffs, contended, that Tampico, at the time of the shipment of the goods, being in the firm possession of the United States by conquest and military occupation, was not a foreign country within the meaning of the act of July 30, 1846, and, consequently, that the goods brought in the Catharine were not liable to duty.

The act of July 30, 1846, reducing the duty on imports and for other purposes, provides that there shall be collected on the goods, wares, and merchandise therein enumerated, imported from foreign countries, certain rates of duty.

The first question, then, is, What is a foreign country, within the meaning of the revenue laws?

A foreign country is one exclusively within the sovereignty of a foreign nation, and without the sovereignty of the United States. This is the well-settled meaning of the word "foreign," in acts of Congress. 1 Gall., 58, 55; 1 Story, 1; 2 Gall., 4, 485; 1 Brock., 241; 4 Wheat., 254.

If, then, Tampico, during its occupation by the forces of the *607] United States, was not exclusively within the sovereignty of Mexico, it follows that it was not a foreign country, and consequently the goods brought from it were not liable to duty.

Tampico, during its military occupation by our forces, was under the sovereignty and within the jurisdiction of the United States. The sovereignty of Mexico over it was superseded by that of the United States.

This change of sovereignty, as a consequence of firm military occupation, is as settled as any other principle of the law of nations, and has been repeatedly recognized by the highest authority in this country. *United States v. Rice*, 4 Wheat., 246.

It might suffice to refer simply to the case of *Castine*, which contains a lucid exposition of the law of nations on the point in question, and is conceived to be decisive of the present case. It is proposed, however, to bring to the attention of the court some additional authorities on the subject of the legal effect of the capture and firm possession — such as existed in the case of Tampico and the State of Tamaulipas — of a portion of an enemy's territory.

The result of the authorities may be briefly stated as follows. The duty of allegiance is reciprocal to the duty of protection. When, therefore, a nation is unable to protect a portion of its territory from the superior force of an enemy, it loses its claim to the allegiance of those whom it fails to protect, and the conquered inhabitants pass under a temporary allegiance to the conqueror, and are bound by such laws, and such only, as he may choose to impose. The sovereignty of the nation which is thus unable to protect its territory is displaced, and that of the successful conqueror is substituted in its stead.

The jurisdiction of the conqueror is complete. He may change the form of government and the laws at his pleasure, and may exercise every attribute of sovereignty. The conquered territory becomes a part of the domain of the conqueror, subject to the right of the nation to which it belonged to recapture it if they can. By reason of this right to recapture, the title of the conqueror is not perfect until confirmed by treaty of peace. But this imperfection in his title is, practically speaking, important only in case of alienation made by the conqueror before treaty. If he sells, he sells subject to the right of recapture.

But although, for purposes of sale, the title of the conqueror is imperfect before cession, for purposes of government and jurisdiction his title is perfect before cession. As long as he retains possession he is sovereign; and not the less sovereign because his sovereignty may not endure for ever.

*Grotius (ch. 6, book 3, § 4), speaking of the right to things taken in war, says that land is reputed lost [*608 which is so secured by fortification that without their being forced it cannot be repossessed by the first owner. And in ch. 8, book 3, treating of empire over the conquered, he shows that sovereignty may be acquired by conquest.

Wolffius, in his treatise *De Jure Gentium* (ch. 7, *De Jure Gentium in Bello*, § 863), states the doctrine very strongly.

Puffendorf, book 8, ch. 11, title "How Subjection ceases"; same author, *Treatise on the Duties of the Man and the Citizen*, book 2, ch. 10, § 2; Bynkershoek on the Law of War, Duponceau's translation, 124; 2 Burlamaqui, 74; Vattel, book 3, ch. 13, and book 1, ch. 17; Martens on the Law of Nations, book 8, ch. 3, § 8; Wheaton, *Elements of International Law*, p. 440; 7 Co., 17, *b*; Dyer, 224, *a*, pl. 29; 2 P. Wms., 75; Cowp., 204; Dods., 450; 2 Hagg. Cons., 371; 9 Cranch, 191; 7 Pet., 86; 2 Gall., 485; 4 Wheat., 246; 1 Op., Att. Gen., 119.

These authorities seem to establish conclusively,—

1st. That, by conquest and firm military occupation of a portion of an enemy's country, the sovereignty of the nation to which the conquered territory belongs is subverted, and the sovereignty of the conqueror is substituted in its place.

2d. That although this sovereignty, until cession by treaty, is subject to be ousted by the enemy, and therefore does not give an indefeasible title for purposes of alienation, yet while it exists it is supreme, and confers jurisdiction without limit over the conquered territory, and the right to allegiance in return for protection.

It follows that Tampico, while in the military possession of our forces, passed from the sovereignty of Mexico to the sovereignty of the United States, and was subject in the fullest manner to the jurisdiction of the United States, and therefore could in no correct sense be said to be foreign to the United States.

It cannot be denied that these principles, established by the common consent of the civilized world, must govern the title to conquests made by the United States. As one of the family of nations, they are bound by the law of nations, and the nature and effect of their acquisitions by conquest must be defined and regulated by that law.

That the United States may acquire territory by conquest results from their power to make war. They cannot in this respect be less competent than all the other nations of the world. The right to acquire by conquest is an inseparable incident to the right to maintain war.

*609] *Mr. Justice Story, in the third volume of his Commentaries on the Constitution, says, at p. 160:—"The Constitution confers on the government of the Union the power of making war and of making treaties; and it seems consequently to possess the power of acquiring territory either by conquest or treaty."

And at p. 193:—"As the general government possesses the right to acquire territory, either by conquest or treaty, it would seem to follow as an inevitable consequence that it possesses the power to govern what it has so acquired."

Chief Justice Marshall, in the *Am. Ins. Co. v. Canter*, 1 Pet., 542, treats it as clear. "The Constitution," says he, "confers absolutely on the government of the Union the powers of making war and making treaties; consequently, that government possesses the power of acquiring territory either by conquest or treaty."

The messages of the President to Congress during the war, and the instructions from the heads of departments, contain authoritative declarations as to the right of the United States

to acquire foreign territory by conquest, and as to the effect of such conquest upon the sovereignty of the conquered territory, in accordance with the principles above stated. Thus, the President, in his message of December, 1846, says:—"By the law of nations a conquered territory is subject to be governed by the conqueror during his military possession, and until there is either a treaty of peace or he shall voluntarily withdraw from it. The old civil government being necessarily superseded, it is the right and duty of the conqueror to secure his conquest, and to provide for the maintenance of civil order and the rights of the inhabitants. This right has been exercised and this duty performed by our military and naval commanders, by the establishment of temporary governments in some of the conquered provinces in Mexico, assimilating them as far as practicable to the free institutions of our own country."

See also the message of 7th December, 1847.

The instructions from the Secretary of War to General Kearney, commanding the expedition to New Mexico and California, dated June 8, 1846, (House Doc. No. 60, 1st Sess. 30th Congress, p. 153,) which were transmitted to General Taylor, with liberty to observe the same course of conduct in the departments that might be conquered by him, provide for the establishment of temporary civil governments, recommend the employment of such of the existing civil officers as were known to be friendly to the United States, and would take the oath of allegiance to them, and authorize him to assure the people of those provinces of the wish and design of the United States to *provide for them a free government, [*610 with the least possible delay, similar to that which exists in our territories.

See also the instructions of the Secretary of the Navy to the officers commanding the naval forces in the Pacific.

Reference is also made to the circular from the Treasury Department to collectors and other officers of the customs, which contains the following clause:—"Foreign imports, which may be reexported in our vessels to Matamoras, will not be entitled to any drawback of duty; for if this were permitted, they would be carried from that port into the United States, and thus evade the payment of all duties. Whenever any other port or place upon the Mexican side of the Rio Grande shall have passed into the actual possession of the forces of the United States, such ports and places will be subject to all the above instructions which are applicable to the port of Matamoras."

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Mr. Johnson, for the defendant, *Page*, contended that *Tampico*, in the year 1847, although in the military occupation of the forces of the United States, was a foreign country within the meaning of the first section of the Revenue Act of 30th July, 1846; and therefore plaintiffs below were not entitled to recover back the duties paid by them.

Mr. Johnson said that the President, in the exercise of his constitutional power as commander-in-chief of the army, determined that the war must support itself as far as practicable; that Mexico must be made to furnish contributions in every way. The operations of the army were therefore continued until it conquered as much territory as originally belonged to the old thirteen States, and the capital of the enemy fell into its hands. Our flag covered all this country, and if the argument on the other side is sound, every port in Mexico became a domestic port of the United States. The government may acquire territory under the war power and by conquest; also, under the treaty-making power; and under either it is as much the property of the United States as the territory which belonged to us at the adoption of the Constitution. But with this admission we must stop. The President is not the government. The argument on the other side implies that the President can acquire whatever territory he chooses. The error is in supposing that an analogy exists between our government and that of England. The power to declare war is differently placed. The counsel says that the power to declare war carries with it a right to conquer the country of the enemy. But Congress alone has *611] the power to declare war, and *the President is only the agent of Congress in carrying it on. Sir William Scott and Lord Mansfield may be right when they say, that, instantly upon the conquest of a country, the laws of England are extended over it. But it is not so with us.

The cases cited say that the conqueror becomes proprietor. But our Constitution says that Congress has the power to make rules for the government of territories. If the argument on the other side be sound, it must be the President who has this power. The true view of the subject is, that the President, or rather the United States, had only a *quasi* ownership of the conquered country. We held it by a military title only. The treaty with Mexico recognized this as Mexican country. When she regained it, her title did not accrue under the treaty with us, but the original sovereignty was reëstablished. Our claim to California does not rest on conquest, but on the subsequent treaty. Instead of the extension of our laws over the acquired territory being the

result of mere conquest, as in England, the President recommended that Congress should pass an act for this special purpose.

Mr. Johnson then referred to and commented upon the following authorities and documents.

The Foltina, 1 Dods., 450; *Campbell v. Hall*, 1 Cowp., 204; *Thirty hds. of Sugar*, 9 Cranch, 191; *United States v. Rice*, 4 Wheat., 246; 1 Bl. Com., 257.

Act of March 1, 1817, "An act concerning the navigation of the United States." 3 Stat. at L., 351.

Circular of Mr. Crawford, Secretary of the Treasury, of 29th September, 1817, on the subject of that act.

Act declaring the existence of war between the United States and Mexico, May 13, 1846. Session Laws of 1846, Stat. at L., 9.

Treaty of peace with Mexico, February 2, 1848. Session Laws, 1848, Stat. at L., 108.

President Polk's message to Congress, 1846-47. 1 Executive Documents, 2d Session 29th Congress, No. 4.

President Polk's message to Congress, 1847-48. 1 Executive Documents, 1st Session 30th Congress, No. 8.

Circulars of Mr. Walker, Secretary of the Treasury, to collectors and officers of the customs within the United States, during the existence of war with Mexico, 11th June, 1846 (1 Mayo, 326); 30th June, 1846 (Id., 328); 8th December, 1846 (Id., 358); 16th December, 1846 (Id., 358); 7th April, 1847 (Id., 425).

President Polk to Secretary Walker, 23d March, 1847, 1 Mayo, 412.

*Secretary Walker to the President, 30th March, 1847, 1 Mayo, 413. [*612

President to Secretaries of War and Navy, 31st March, 1847, 1 Mayo, 415, 417.

Instructions of Secretaries of War and Navy to officers, 3d April, 1847, 1 Mayo, 416, 417.

Secretary Walker to the President, 10th June, 1847, and orders of President thereon, 1 Mayo, 425.

The same to the same, 5th November, 1847, 1 Mayo, 425, 426.

The same to the same, 16th November, 1847, Id., 426, 427.

Commodore Conner's despatch as to surrender of Tampico, 17th November, 1846. 7 Executive Documents, 1st Session 30th Congress, No. 60, p. 270.

See also General Taylor's despatch to Adjutant-General, 26th November, 1847, Id., 378.

The construction contended for by the other side would render illegal the whole action of the government. A tariff was prescribed under the authority of the President, by which certain duties were levied upon goods when imported into Mexican ports when they were in our possession. Where did he get that power? Not from any act of Congress laying those duties, but in virtue of his character as commander-in-chief of the army, and in the exercise of military authority over the conquered country. If these ports were within the United States, the President would have no right to collect a revenue from them. The money was not only collected, but also disbursed by officers of the army and navy for the maintenance of the public service, without being brought into the treasury of the United States. All this practice must be condemned, and the money thus collected refunded, if the court should decide Tampico to have been an American port. All the inhabitants, too, must have become converted into American citizens.

Mr. Webster, in reply and conclusion, said that there was a difference between the Territories and the other parts of the United States. Judges were there appointed for terms of years, which the Constitution forbade as to other parts of the country. Hence, the part of the Constitution which directs that duties must be equal in all the ports of the United States does not apply to Territories. A foreign country is that which is without the sovereignty of the United States, and exclusively within the sovereignty of some other nation. In the *Castine* case, this court decided that the question must be tested by the *sovereignty. If that is in *613] the United States, then the port is not a foreign port. Its being held under a military power makes no difference. We think it is the fact of sovereignty which decides to what nation the port belongs. The difference between this country and England, as to the source of the war-making power, is supposed by the Attorney-General to create a difference in the rule which governs exports and imports; but he shows no reason or authority for this conclusion. If the fact of sovereignty exists, it is no matter whether there was a war or not. His argument is, that the acquisition accrues to Congress, because Congress possesses the war-making power. We agree that the acquisition accrues to the government which conquers it, and if he could show that it does not accrue to the crown in England until there is some act of acceptance, then his argument would have weight. But there is no case to show this. The presumption is, that the acqui-

sition accrues to the power which makes the conquest, and that sovereignty vests immediately. 1 Cowp., 208. The best exposition of this matter is contained in Executive Documents, House, No. 20, 2d Session of the 30th Congress. The right to conquer the territory of the enemy, and levy contributions, is claimed under the laws of nations. Congress could not have directed the mode of carrying on the war. The consequences of acts done under the laws of nations are just the same in this government as in all others. The theory that a conquest accrues to the king in England is merely technical. As to Florida, the treaty was not ratified until 1821 or 1822, although made in 1819. The Treasury Circular of 29th June, 1845, recites a circular from the Department issued in the Florida case, saying that goods from Pensacola must pay duties until Congress created a collection district there. But this was a misapprehension of the true ground of this decision. The Attorney-General (Ex. Doc., 2d Session 25th Congress, p. 358), in the case of the Olive Branch, said that the jurisdiction of the former sovereign continued until possession was delivered. The reason was, that Florida was not ceded. The vessel sailed from Pensacola on the 14th of July, and possession was not delivered to the United States until the 17th of July.

The Attorney-General says, that our title to California rests upon treaty, and not upon conquest. But it was ours before the treaty was made, and goods were brought from there into the United States free of duty. In the case of Tampico, how can we move an inch without seeing that it was an American port? Here are instructions from the executive department of the government to regulate things there for a year before *Congress took up the matter. [*614 An effort is made to connect this subject with the military contributions. But they are not alike. This case relates to our own office in the city of Philadelphia. It has no connection with contributions levied in Mexico, or collecting duties there. Tampico belonged to us just as much as Castine belonged to the British. Possession for one purpose is possession for all purposes. If it did not belong to us, whose was it? Did it belong to Mexico? Suppose a British or French fleet had attacked it whilst our flag was flying over it, would it not have been considered as making war upon the United States?

Mr. Chief Justice TANEY delivered the opinion of the court.

The question certified by the Circuit Court turns upon the

construction of the act of Congress of July 30, 1846. The duties levied upon the cargo of the schooner Catharine were the duties imposed by this law upon goods imported from a foreign country. And if at the time of this shipment Tampico was not a foreign port within the meaning of the act of Congress, then the duties were illegally charged, and, having been paid under protest, the plaintiffs would be entitled to recover in this action the amount exacted by the collector.

The port of Tampico, at which the goods were shipped, and the Mexican State of Tamaulipas, in which it is situated, were undoubtedly at the time of the shipment subject to the sovereignty and dominion of the United States. The Mexican authorities had been driven out, or had submitted to our army and navy; and the country was in the exclusive and firm possession of the United States, and governed by its military authorities, acting under the orders of the President. But it does not follow that it was a part of the United States, or that it ceased to be a foreign country, in the sense in which these words are used in the acts of Congress.

The country in question had been conquered in war. But the genius and character of our institutions are peaceful, and the power to declare war was not conferred upon Congress for the purposes of aggression or aggrandizement, but to enable the general government to vindicate by arms, if it should become necessary, its own rights and the rights of its citizens.

A war, therefore, declared by Congress, can never be presumed to be waged for the purpose of conquest or the acquisition of territory; nor does the law declaring the war imply an authority to the President to enlarge the limits of the United States by subjugating the enemy's country. The United States, it is true, may extend its boundaries by conquest or treaty, and *may demand the cession of territory as the condition of peace, in order to indemnify its citizens for the injuries they have suffered, or to reimburse the government for the expenses of the war. But this can be done only by the treaty-making power or the legislative authority, and is not a part of the power conferred upon the President by the declaration of war. His duty and his power are purely military. As commander-in-chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country, and subject it to the sovereignty and authority of the United

States. But his conquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power.

It is true, that, when Tampico had been captured, and the State of Tamaulipas subjugated, other nations were bound to regard the country, while our possession continued, as the territory of the United States, and to respect it as such. For, by the laws and usages of nations, conquest is a valid title, while the victor maintains the exclusive possession of the conquered country. The citizens of no other nation, therefore, had a right to enter it without the permission of the American authorities, nor to hold intercourse with its inhabitants, nor to trade with them. As regarded all other nations, it was a part of the United States, and belonged to them as exclusively as the territory included in our established boundaries.¹

But yet it was not a part of this Union. For every nation which acquires territory by treaty or conquest holds it according to its own institutions and laws. And the relation in which the port of Tampico stood to the United States while it was occupied by their arms did not depend upon the laws of nations, but upon our own Constitution and acts of Congress. The power of the President under which Tampico and the State of Tamaulipas were conquered and held in subjection was simply that of a military commander prosecuting a war waged against a public enemy by the authority of his government. And the country from which these goods were imported was invaded and subdued, and occupied as the territory of a foreign hostile nation, as a portion of Mexico, and was held in possession in order to distress and harass the enemy. While it was occupied by our troops, they were in an enemy's country, and not in their own; the inhabitants were still foreigners and enemies, and owed to the United States nothing more than *the submission and obedience, sometimes called temporary allegiance, which is [*616 due from a conquered enemy, when he surrenders to a force which he is unable to resist. But the boundaries of the United States, as they existed when war was declared against Mexico, were not extended by the conquest; nor could they be regulated by the varying incidents of war, and be enlarged or diminished as the armies on either side advanced or retreated. They remained unchanged. And every place

¹ QUOTED. *Hanauer v. Woodruff*, 15 Wall., 447. CITED. *Ford v. Surgett*, 7 Otto, 617.

which was out of the limits of the United States, as previously established by the political authorities of the government, was still foreign; nor did our laws extend over it. Tampico was, therefore, a foreign port when this shipment was made.¹

Again, there was no act of Congress establishing a custom-house at Tampico, nor authorizing the appointment of a collector, and, consequently, there was no officer of the United States authorized by law to grant the clearance and authenticate the coasting manifest of the cargo, in the manner directed by law, where the voyage is from one port in the United States to another. The person who acted in the character of collector in this instance, acted as such under the authority of the military commander, and in obedience to his orders; and the duties he exacted, and the regulations he adopted, were not those prescribed by law, but by the President in his character of commander-in-chief. The custom-house was established in an enemy's country, as one of the weapons of war. It was established, not for the purpose of giving to the people of Tamaulipas the benefits of commerce with the United States, or with other countries, but as a measure of hostility, and as a part of the military operations in Mexico; it was a mode of exacting contributions from the enemy to support our army, and intended also to cripple the resources of Mexico, and make it feel the evils and burdens of the war. The duties required to be paid were regulated with this view, and were nothing more than contributions levied upon the enemy, which the usages of war justify when an army is operating in the enemy's country. The permit and coasting manifest granted by an officer thus appointed, and thus controlled by military authority, could not be recognized in any port of the United States, as the documents required by the act of Congress when the vessel is engaged in the coasting trade, nor could they exempt the cargo from the payment of duties.

This construction of the revenue laws has been uniformly given by the administrative department of the government in every case that has come before it. And it has, indeed, been given in cases where there appears to have been stronger *617] *ground for regarding the place of shipment as a domestic port. For after Florida had been ceded to the United States, and the forces of the United States had taken possession of Pensacola, it was decided by the Treasury Department, that goods imported from Pensacola before an

¹ QUOTED. *New Orleans v. Steamship Co.*, 20 Wall., 398.
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act of Congress was passed erecting it into a collection district, and authorizing the appointment of a collector, were liable to duty. That is, that although Florida had, by cession, actually become a part of the United States, and was in our possession, yet, under our revenue laws, its ports must be regarded as foreign until they were established as domestic, by act of Congress; and it appears that this decision was sanctioned at the time by the Attorney-General of the United States, the law-officer of the government. And although not so directly applicable to the case before us, yet the decisions of the Treasury Department in relation to Amelia Island, and certain ports in Louisiana, after that province had been ceded to the United States, were both made upon the same grounds. And in the latter case, after a custom-house had been established by law at New Orleans, the collector at that place was instructed to regard as foreign ports Baton Rouge and other settlements still in the possession of Spain, whether on the Mississippi, Iberville, or the sea-coast. The Department in no instance that we are aware of, since the establishment of the government, has ever recognized a place in a newly acquired country as a domestic port, from which the coasting trade might be carried on, unless it had been previously made so by act of Congress.

The principle thus adopted and acted upon by the executive Department of the government has been sanctioned by the decisions in this court and the Circuit Courts whenever the question came before them. We do not propose to comment upon the different cases cited in the argument. It is sufficient to say, that there is no discrepancy between them. And all of them, so far as they apply, maintain, that under our revenue laws every port is regarded as a foreign one, unless the custom-house from which the vessel clears is within a collection district established by act of Congress, and the officers granting the clearance exercise their functions under the authority and control of the laws of the United States.

In the view we have taken of this question, it is unnecessary to notice particularly the passages from eminent writers on the laws of nations which were brought forward in the argument. They speak altogether of the rights which a sovereign acquires, and the powers he may exercise in a conquered country, and they do not bear upon the question we are considering. For *in this country the sovereignty [*618 of the United States resides in the people of the several States, and they act through their representatives, according to the delegation and distribution of powers contained in the

Constitution. And the constituted authorities to whom the power of making war and concluding peace is confided, and of determining whether a conquered country shall be permanently retained or not, neither claimed nor exercised any rights or powers in relation to the territory in question but the rights of war. After it was subdued, it was uniformly treated as an enemy's country, and restored to the possession of the Mexican authorities when peace was concluded. And certainly its subjugation did not compel the United States, while they held it, to regard it as a part of their dominions, nor to give to it any form of civil government, nor to extend to it our laws.

Neither is it necessary to examine the English decisions which have been referred to by counsel. It is true that most of the States have adopted the principles of English jurisprudence, so far as it concerns private and individual rights. And when such rights are in question, we habitually refer to the English decisions, not only with respect, but in many cases as authoritative. But in the distribution of political power between the great departments of government, there is such a wide difference between the power conferred on the President of the United States, and the authority and sovereignty which belong to the English crown, that it would be altogether unsafe to reason from any supposed resemblance between them, either as regards conquest in war, or any other subject where the rights and powers of the executive arm of the government are brought into question. Our own Constitution and form of government must be our only guide. And we are entirely satisfied that, under the Constitution and laws of the United States, Tampico was a foreign port, within the meaning of the act of 1846, when these goods were shipped, and that the cargoes were liable to the duty charged upon them. And we shall certify accordingly to the Circuit Court.

Mr. Justice McLEAN dissented.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Pennsylvania, and on the point or question on which the judges of the said Circuit Court were opposed in opinion, and which was certified to this court for its opinion, agreeably to the act of Congress in such case

*619] made and provided, and was argued by counsel. On

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consideration whereof, it is the opinion of this court, that Tampico was a foreign port within the meaning of the act of Congress of July 30, 1846, entitled "An act reducing the duties on imports, and for other purposes," and that the goods, wares, and merchandise as set forth and described in the record were liable to the duties charged upon them under said act of Congress. Whereupon it is now here ordered and adjudged by this court, that it be so certified to the said Circuit Court.

WILLIAM H. MARRIOTT, PLAINTIFF IN ERROR, v. FREDERICK W. BRUNE, JOHN C. BRUNE, AND WILLIAM H. BRUNE, COPARTNERS, TRADING UNDER THE FIRM OF F. W. BRUNE & SONS.

By the eleventh section of the act of Congress passed on the 30th of July, 1846 (Stat. at L., Pamphlet, page 46), the duties upon imported sugar are fixed at thirty per cent. *ad valorem*.

The true construction of this law is, that the duty should be charged only upon that quantity of sugar and molasses which arrives in our ports, and not upon the quantity which appears by the invoice to have been shipped; an allowance being proper for leakage.¹

The proviso in the eighth section, viz. "that under no circumstance shall the duty be assessed upon an amount less than the invoice value," is not in hostility with the above construction, because the proviso refers only to the price, and not to the quantity.

A protest made after the payment of the duties charged, and after the case had been closed up, will not enable a party to recover back the money from the collector; but if the protest be made in a single case, with a design to include subsequent cases, and the money remains in the hands of the collector without being paid into the treasury, and it was so understood by all parties, such a protest will entitle the importer to recover the money from the collector.²

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the District of Maryland.

It was an action of assumpsit brought by F. W. Brune & Sons against William H. Marriott, the collector of the port of Baltimore, to recover back certain duties upon importations of sugar and molasses, which, it was alleged, had been illegally charged, and paid under protest.

The importations were made in various vessels, and at various times, between the 2d of February, 1847, and the 4th of November, 1848.

¹ FOLLOWED. *United States v. Southmayd*, post, *646; *Lawrence v. Caswell*, 13 How., 496; *Balfour v. Sullivan*, 8

Linn, 24 How., 526. ² DISTINGUISHED. *Warren v. Peaslee*, 2 Curt., 236.

Sawyer, 649, 650. CITED. *Belcher v.*

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On the 3d of February, 1847, the Secretary of the Treasury addressed to Mr. Marriott the following letter :—

*620] *“ *Treasury Department, February 3d, 1847.*

“SIR,—For your information and government, in regard to allowances to be made for deficiencies and leakage on imports, where quantities are ascertained by weighing, gauging, or measuring, I transmit a copy of my instructions to the collector of New Orleans, of the 30th ultimo, fixing the principles on which said allowances are to be made.

“I am, very respectfully, your obedient servant,

“*(Signed,)* R. J. WALKER, *Secretary of the Treasury.*

“WM. H. MARRIOTT, Esq., *Collector of the Customs, Baltimore.*

The copy of the instructions referred to in the above letter was as follows :—

“ *Treasury Department, January 30th, 1847.*

“SIR,—In reference to the subject stated in your letter of the 7th instant, respecting allowances for deficiencies and invoice value, I would remark, that the law makes no distinction between articles subject heretofore to specific rates of duty, but now liable to *ad valorem* duty, in the mode of ascertaining quantities with a view to fix the values on which the duties are to be assessed. Whatever allowance, therefore, would have been made under former laws on articles subject to specific duty, would inure under existing laws on articles of the same description now liable to *ad valorem* rates of duty. Consequently, where the specific duty was heretofore levied on the actual quantity landed, as ascertained from actual weighing, gauging, or measuring, the same course is to be pursued in regard to the same description of articles under existing rates of duty.

“If, therefore, the quantity of any article falls short of the amount given in the invoice, on due ascertainment, as before stated, an abatement of the duties to the extent of the deficiency should be made. If, on the contrary, it be found to exceed the quantity stated in the invoice, the aggregate cost or value must be made to correspond with such increase, and the duties estimated and assessed accordingly.

“The allowances authorized by the 58th and 59th sections of the act of 2d March, 1799, ch. 128, to which you refer, are still to be allowed. It is therefore to be observed, that the allowance made in the 59th section, of two per cent. for leakage, applies solely to the case of liquors known in commerce

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as such, and as contradistinguished from liquids of any other description.

"I am, very respectfully, your obedient servant,

"R. J. WALKER, *Secretary of the Treasury.*

"DENIS PRIEUR, *Collector of the Customs, New Orleans.*"

*On the 24th of March, 1847, the Treasury Department issued the following circular, through the medium of the telegraph:— [*621

"*E. Mag. Telegraph, March 24, 1847, Washington.*

"SIR,—By direction of the Secretary of the Treasury, you are requested to make no allowances for deficiencies to invoices until further advised.

"(Signed,)

MC. YOUNG, *Chief Clerk.*

"L. M. CHASTEAU, *U. S. Tel.*"

On the same day, the following circular was transmitted through the post-office:—

Circular to Collectors and other Officers of the Customs.

"*Treasury Department, March 24, 1847.*

"The attention of the Department having been specially called to the subject of allowances for deficiency, drainage, leakage, and breakage, under the existing laws, and particularly in reference to the provisions of the 58th and 59th sections of the act of 2d March, 1799, it is decided that in all cases where allowances are claimed under said sections, or either of them, the appraisers, or other proper officers, shall first ascertain whether any deficiency, damage, leakage, or breakage has occurred during the voyage of importation, by stress of weather or other accident at sea, and if so, and the actual leakage, deficiency, or breakage cannot be otherwise ascertained, then to make the allowance as the case may be, for draught, tare, leakage, or breakage, to the extent authorized by said sections; but if said damage, deficiency, leakage, or breakage, so occurring as before mentioned, shall be found by said appraisers or other officers to be less than the amount authorized by said sections, then the allowance shall only be for the actual damage, deficiency, leakage, or breakage; and if the amount be ascertained to be actually greater than the amount allowed in said sections, the actual damage, deficiency, leakage, or breakage shall still be allowed, subject to limitations and restrictions imposed by former circulars.

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"It must be remembered that draught can be allowed only on articles imported in bulk, and tare on articles imported in casks, barrels, bags, boxes, or other packages, and leakage in the case of liquors; but when there is an allowance for tare, draught, leakage, or breakage, it must be confined to a separate allowance for one of them, and cannot be extended to two or more.

"Under the 58th section, the allowance for draught or tare *622] *are only permitted on 'articles subject to duty by weight'; and under the 59th section, the allowance for leakage and breakage is confined to liquors 'subject to duty by the gallon'; and there are no duties imposed by the act approved 30th July, 1836, either by weight or gallon; it is an extremely liberal construction to allow in any case any operation whatever to those sections, even to the limited extent permitted by these instructions.

"(Signed,) R. J. WALKER, *Secretary of the Treasury.*"

. On the 9th of April, 1847, Brune & Sons addressed the following protest to the collector at Baltimore:—

"*Baltimore, 9th April, 1847.*

"GEN. WM. H. MARRIOTT, *Collector of the Port of Baltimore.*

"Dear Sir,— Having been informed that it is the intention of the Secretary of the Treasury not to make allowance on the payment of duties on such articles as may result here less in quantity, from loss in weight or leakage, than at the time of shipment, for instance, sugar, molasses, &c., and on which a duty *ad valorem* of the invoice is exacted, we hereby protest against the payment of such entire amount of duty, being of opinion that the law at present in force authorizes an allowance for actual loss in weight or gauge, as shown by the difference in the invoice and the returns of the weighers and gaugers of such cargoes after delivery in this port.

"We desire that this protest should extend to all our importations of sugar and molasses since the operation of the present tariff, viz.:—

Water Witch, from Aricibo, entered 17th November, 1846.

J. E. Ridgway, from Aricibo, entered 8th February, 1847.

Juliet, from St. Thomas, entered 15th February, 1847.

United States, from Ponce, entered 26th February, 1847.

San Jacinto, from Havana, entered 26th February, 1847.

Creed, from Cardinas, entered 1st March, 1847.

At New York, O. Thompson, from Aricibo, entered 3d March, 1847.

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At New York, Sophia, from Ponce, entered 4th March, 1847.
At New York, Sarah Adams, from Ponce, entered 9th March, 1847.

At New York, Seboris, from Mayaguez, entered 10th March, 1847.

Francis Partridge, from Ponce, entered 2d April, 1847; and Oceola, from Mayaguez, entered this day.

"The protest upon our previous importations was not made *at the time of entry, because we were informed that a fair allowance would be made, but regret now to [*623 learn that the original instructions of the Secretary of the Treasury have been countermanded. We are credibly informed that allowances have, in cases similar to the above, actually been made in neighboring places, and we think ourselves entitled to equal consideration.

"We have the honor to be, dear Sir, your most obedient servants,

"(Signed,)

F. W. BRUNE & SONS."

On the 28th of June, 1847, Brune & Sons addressed the following letter to the Secretary of the Treasury:—

"*Baltimore, June 28th, 1847.*

"SIR,—We are informed by the collector of the customs of this port, that he will refund us, on our importations of molasses, the differences of duty calculated at thirty per cent. *ad valorem* on invoice amount, and what the same would be, taking the net gauge of the casks here as the basis; in other words, allowing for the loss of molasses on the voyage. The collector says, that he will make this return on importations made from the 1st of May last. Now, we have been protesting against the full duty, which has been exacted from us since a length of time, and we would respectfully inquire whether, in your opinion, we are not entitled to a similar return on all our importations since the 1st of December last, when the present tariff went into operation. If such is your decision, will you direct instructions to that effect to be given to the collector?

"We would further respectfully ask whether you do not think the duty upon sugar (especially Muscovado, which from its nature is subject to a considerable loss on the voyage) should be estimated in the same manner as that on molasses; namely, calculating thirty cents *ad valorem* on the cost of the weight landed here, not on the weight shipped; thus making an allowance for an unavoidable drainage, or

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rather only charging duty on the pounds of sugar actually brought into the country and into consumption.

"Hoping you will favor us with an answer to our foregoing inquiries, we remain, &c., &c."

To which letter the following reply was received:—

"Treasury Department, August 9th, 1847.

"GENTLEMEN:—In reply to your letter of the 6th instant, covering a copy of your former letter of the 28th of June last, *624] asking to have the principles of the circular of the 27th of May last applied in the case of importations of molasses made prior to the date of said circular, I beg respectfully to refer you to the inclosed copy of the decision of the Department on a similar application from Moses Taylor and others, importers of molasses at the port of New York, dated the 16th ultimo.

"I would add, that the Department has not deemed it expedient to apply the principles of the circular of the 27th of May last to the importations of sugar.

Very respectfully,

"McC. YOUNG,
Acting Secretary of the Treasury.

"Messrs. F. W. BRUNE & SONS, *Baltimore.*"

The letter to Moses Taylor and others, referred to in the above letter, was as follows:—

"Letter from the Secretary of the Treasury to Moses Taylor and others, importers of molasses, New York.

"Treasury Department, July 16th, 1847.

"GENTLEMEN:—The Department duly received the letter signed by yourselves and other importers of molasses, at the port of New York, dated the 2d ultimo, asking to have the principles established by the circular instructions of the 27th of May last, for estimating the loss or deficiency in the article of molasses occasioned by fermentation, stress of weather, or accident during the voyage of importation, applied to all importations of molasses made prior to the date of said instructions, runing back to the day the present tariff went into operation.

"In reply, I would respectfully state that the Department does not feel authorized, under the circumstances of the case,

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to give a retrospective effect to the regulations referred to, as desired in your application. Very respectfully,

"R. J. WALKER,
Secretary of the Treasury."

On the 5th of June, 1848, the following circular was issued by the Treasury Department:—

"June 5th, 1848.

"Your attention is called to circular instruction of the Department, 24th March, 1847, on subject of allowance for deficiency, &c. It is represented, that at some of the ports, notwithstanding those instructions, allowance is made for tare and draught beyond actual deficiency. This must in no case be permitted, nor can any allowance be made in any case, whether *under the name of tare, or draught, or [*625 otherwise, beyond the actual deficiency which has occurred during the voyage of importation by stress of weather or accident at sea.

"As regards allowance for lost or missing packages, or separate articles, included in the manifest, but not found in vessel at unloading in United States, you will be governed by regulation in circular of 31st December, 1847, p. 1; but in cases where no such package has been lost or missing, no allowance or abatement of duties can be made for any alleged deficiency in any of [the] packages imported, such allowance or abatement being exclusively confined to actual deficiency of any article which may be discovered in packages when opened, as prescribed in last proviso to 21st section of act of 30th August, 1842, it being observed, as enjoined in circular of 18th December, 1847, that such allowance can then only be made in cases where [it] satisfactorily appears to appraisers that the package had not been before opened after shipment for United States, and where the package has not passed out of custody of officers of customs."

The general protest made on the 9th of April, 1847, by Messrs. Brune & Sons, has been already set forth. Afterwards they made a special protest in each of six several importations, but there were thirteen other importations made after the 9th of April, 1847, respecting which they relied upon the efficacy of the general protest of that day.

After the decision of the court in *Cary v. Curtis*, 3 How., 236, Congress passed an act, on the 26th of February, 1845, which, among other things, provides:—"Nor shall any action be maintained against any collector, to recover the amount

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of duties so paid under protest, unless the said protest be made in writing, and signed by the claimant, at and before the payment of such duties, setting forth distinctly and specifically the grounds of objection to the payment thereof." See this act, and the second section of the act of 1839, which it was designed to alter and explain, 5 Stat. at L., 349.

One of the questions before the court was, whether under this act the general protest made on the 9th of April, 1847, would cover importations made after that day.

On the 4th of November, 1848, Brune & Sons brought their action against Marriott in the Circuit Court. At April term, 1849, the cause came on for trial, when the following statement of facts was agreed upon by the counsel. It is not necessary to copy the tabular statements referred to, because the explanation of them is deemed sufficiently intelligible.

*626]

**" Statement of Facts.*

"It is admitted that the schedule A, herewith filed, to be taken as part of this statement, in its first, second, and third columns, correctly exhibits the importations of sugar and molasses by the plaintiffs into the port of Baltimore, between the 8th of February and the 8th of November, A. D., 1847, both inclusive, and likewise the names of the vessels by which, and the places from which, such importations were made, and the dates of the entries of such importations; that column four exhibits the kind of goods so imported, and how they were contained; that column five exhibits the quantity in pounds of the sugar, and in gallons of the molasses, shipped in the West Indies, as stated in the invoices which accompanied such importations; that column seven exhibits the dutiable value in foreign currency (including all costs and charges) of the goods mentioned in the said invoices; which in column eight is changed into American currency, and upon this value duties were computed and exacted by the defendant of the plaintiffs, and paid by them in order to get possession of their said goods, and that the amounts of duties so exacted and paid are stated in column nine.

"It is further admitted, that all the goods imported by the plaintiffs, as aforesaid, after their arrival and entry at the custom-house, were by the direction of the defendant submitted to the examination of weighers and gaugers, officers belonging to the custom-house, and who made returns of the weight and gauge respectively of the goods submitted to them, which returns are correctly exhibited in column six.

"It is further admitted, that if column eight correctly ex-

hibits the value at the place of shipment of the quantity of goods mentioned in the invoices, including costs and charges, and exhibited in column five as having been shipped, then column ten exhibits the proportionate value at the place of shipment of the diminished quantity of goods, as ascertained by said officers to have arrived in Baltimore, and exhibited in column six, including their proportionate share of costs and charges; that column eleven exhibits the amount of duty, at thirty per cent. *ad valorem*, on the goods as valued in column ten; that column twelve exhibits the excess of duties alleged by the plaintiffs to have been overpaid by them, and the aggregate of the sums in this column constitutes the claim, without interest, which they seek to recover in this action.

"The plaintiffs also claim interest on the alleged over-payments appearing in column twelve, from the time of such *payments respectively, and which interest is to be [*627 hereafter correctly ascertained.

"It is agreed that column ten of schedule B exhibits the value in American currency of the deficiency of the goods upon arrival, as compared with the invoices, agreeably to the ascertainment of the actual quantity of goods arrived, by the gauger and weigher respectively, no account being taken of costs and charges, except in the case of molasses, the proportion of commission being allowed on that article.

"It is also agreed, that column eleven in said schedule exhibits the amount of thirty per cent. on the value of such deficiency so exhibited.

"It is further admitted, that the above-mentioned deficiency between the quantity of goods which arrived, according to the returns of the government officers, and that appearing in the invoices, occurred on, and was produced by, the voyage of importation. And it is also admitted, that allowances for damage to sugar and molasses injured by a peril of the sea on the voyage of importation are calculated in the mode contended for by the plaintiffs as the true mode of ascertaining their alleged over-payments.

"It is further admitted, that upon the 9th of April, 1847, the plaintiffs addressed and delivered to the defendant the general notice or protest in writing signed by them, and herewith filed, marked C; and likewise, at the time of the entries of the cargoes of the *Uzardo*, *Samuel G. Mitchel*, *Isabella*, *G. W. Russell*, *W. J. Watson*, and *Aristes*, respectively addressed and delivered to the defendant a special notice or protest in writing, signed by them, and copies of which protests are herewith filed, marked D.

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"It is further submitted, whether the protest of the 9th April, 1847, can be applied to the excess of duties claimed to have been paid unjustly upon the cargoes of any vessels on whose cargoes the deficiencies were ascertained and finally adjusted before the date of said protests, and whether it can be applied to the cargoes of those vessels whose deficiencies were not finally adjusted by the impost clerk, and whose duties were not finally charged to the collector in his accounts until after said protest, although said deficiencies were ascertained in fact by the gauger and weigher respectively; and whether such general protest can be applied to any subsequent importations and payments of the plaintiffs in regard to which there was no especial protest.

"And it is admitted, that the deficiencies upon all the cargoes arriving before the Sarah Adams had been ascertained *628] by the gauger and weigher respectively, and returned by them to the defendant, and had been finally adjusted by the impost clerk, and that the duties on such cargoes had been charged to the defendant in his accounts with the treasury before the 9th of April, 1847; but it is admitted, that although the gauger and weigher had returned to the defendant the deficiencies on the cargoes of the Sarah Adams, Sebois, and Magnolia, yet that the impost clerk, whose duty it is to compare such returns with the invoices, did not act thereon and ascertain and adjust the true amount of duties due on such cargoes, and report thereon to the defendant, until after the said 9th of April, 1847.

"And it is further admitted, that the gauger and weigher did not make their returns of the deficiency in the cargo of the Frances Partridge until the 10th of April, 1847.

"It is also admitted, that the custom of the importing merchants of Baltimore in the sale of sugar and molasses is as follows, viz. :—Sugar is sold per pound, that is, at a given price per hundred pounds, and molasses per gallon, upon the quantity returned by the weigher and gauger as having been imported, without any reference in either case (as to the price) whether a deficiency in quantity has been suffered on the voyage of importation or not, and also that in no case is the cask in which the sugar or molasses is contained sold separately by said importing merchants.

"And it is also admitted, that in all importations of sugar from Porto Rico no charge for casks appears in the invoices, but that in importations of molasses from that island, and of sugar and molasses from Cuba, a separate charge is made for the cask.

"It is agreed, that any acts of Congress, and the instruc-

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tions of the Secretary of the Treasury, and his correspondence with the plaintiffs, may be referred to by either party for whatever purpose they may be legally available.

"Upon the foregoing statement of facts, the questions to be submitted to the court are,—

"First. Whether the amount of duties, or any part thereof, exacted by the defendant and paid by the plaintiffs was illegally exacted, by reason of being charged upon the entire amount and value of the goods appearing in the invoices to have been shipped, without any allowance for the deficiency in weight or gauge from the voyage of importation, as shown by the returns of the government officers; and,

"Secondly. Whether the plaintiffs can recover back in this suit the duties so exacted, [or] any part thereof.

"If upon these questions the opinion of the court should be *in favor of the plaintiffs, then the court shall give [*629 judgment for the plaintiffs, with costs; but if on these questions the opinion of the court should be in favor of the defendant, then judgment shall be entered for the defendant, with costs. And it is further agreed, that if the judgment in this case should be in favor of the plaintiffs, the amount, including interest, for which the judgment shall be entered up may be hereafter calculated, in conformity with the principles which the court shall decide to govern the case, with liberty to either party to appeal from the judgment of the court, and with the further agreement, as part of this statement, that the court shall be at liberty to draw such inferences from the facts above stated as a jury might or would draw therefrom, and that either party shall hereafter have power to add to this statement any fact admitted by the other party to exist, which may be deemed essential by the court for the proper decision of the above questions.

"BROWN & BRUNE, *for Plaintiffs.*

W. L. MARSHAL, *for Defendant.*"

Upon this statement of facts the opinion of the Circuit Court, as delivered by Mr. Chief Justice Taney, was, that the allowance for drainage and leakage ought to be made, and that the reduction ought to be made according to the dutiable value of the portion lost. With respect to the sufficiency of the protest, the court held that the protest of 9th April, 1847, could not apply to payments previously made, and the plaintiff was not entitled to recover them; but that it covered all cargoes where the duties had not before been finally assessed and adjusted by the collector.

The court thereupon entered judgment for the plaintiffs,

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on the case stated, for the damages laid in the declaration, and costs, to be released on payment of \$5,274.29, with interest from the 19th of May, 1849, until paid, and costs of suit.

From this judgment Mr. Marriott sued out a writ of error, and brought the case up to this court.

It was argued by *Mr. Johnson* (Attorney-General), for the plaintiff in error, and *Mr. Brune*, for the defendants in error.

Mr. Johnson made the following points:—

1. That the duties were properly assessed upon the amount of the invoices, under the eighth section of the Tariff Act of 1846.

2. That the loss of the sugars from drainage entered into the estimation of their value at the time of purchase, and their cost to the importer at the time of landing in this country.

*630] 3. That the general protest of 9th April, 1845, is not sufficient to cover the duties on sugars imported subsequent thereto, but that a protest in each subsequent importation is required by law. Act of 26th February, 1845 (5 Stat. at L., 727).

4. That the protest must be made at and before the payment of the estimated duties, this payment being necessary to obtain the goods by the importer. Act of 26th February, 1845 (5 Stat. at L., 727); § 49 of the Act of 2d March, 1799 (1 Stat. at L., 664).

In the course of his argument, *Mr. Johnson* referred to the following Treasury circulars, in addition to those above stated:—Mr. Secretary Walker to Collectors and other Officers of the Customs, 25th November, 1846 (1 Mayo, 349); 24th March, 1847 (*Id.*, 360); 27th May, 1847 (*Id.*, 362); 31st December, 1847 (*Id.*, 404, *et seq.*; see *voce* "Allowances," 405; see also *voce* "Invoices," 407); 5th June, 1848 (printed copy); 12th June, 1848 (printed copy); 1st February, 1849 (printed copy). Mr. Secretary Meredith, 27th July, 1849 (printed copy); 10th August, 1849 (printed copy).

Mr. Brune, for the defendants in error, made the following points:—

1. That they were only chargeable by law with duties upon the value of quantities of goods actually imported by them, as shown by the returns of the weighmasters and

gaugers, and not upon the value of any portions of such goods lost upon the voyage of importation.

2. That, as there is no evidence in the case, by appraisal or otherwise, of any undervaluation in the invoice value of the goods shipped at the foreign ports, the invoice values must be held to be the true dutiable values of the goods so shipped; and, as full duties have been exacted from the defendants in error upon the whole quantity of goods shipped, and as if it had all arrived, without any allowance or deduction for such portion of such goods as was lost on the voyage, they may now recover the sums exacted by way of duty upon the portion of goods so lost.

3. That the defendants in error, by the protest of the 9th of April, 1847, and their other protests subsequent thereto, have sufficiently complied with the provisions of the act of 1845, ch. 22; and under them the plaintiff in error is liable in this action for the sums exacted by way of duty upon goods lost by leakage or drainage on the voyage of importation, belonging to all the cargoes entered on and after that day, as well as belonging to cargoes previously entered, but which were not then finally adjusted. [*681]

In the argument of the first and second points, the counsel referred to the following acts of Congress:—1799, ch. 22, §§ 21, 49, 72 (1 Stat. at L., 627); 1818, ch. 79, §§ 4, 5, 9, 15 (3 Stat. at L., 433); 1823, ch. 21, §§ 1, 4, 5, 16 (3 Stat. at L., 729); 1828, May 19, § 8 (4 Stat. at L., 273); 1832, July 14, §§ 7, 15 (4 Stat. at L., 591, 593); 1842, ch. 270, §§ 16, 21, 24 (5 Stat. at L., 548); 1846, July 30, §§ 1, 4, 8.

And to the following acts, authorizing allowances:—1799, ch. 22, §§ 52, 58, 59 (1 Stat. at L., 627); 1818, ch. 79, §§ 15, 16 (3 Stat. at L., 433); 1823, ch. 21, § 21 (3 Stat. at L., 729); 1842, ch. 270, § 21 (5 Stat. at L., 548), to be taken in connection with § 22 of the act of 1818, and § 15 of the act of 1823, just cited.

And to the following acts in construction of the proviso of the eighth section of the act of 1846, viz.:—1818, ch. 79, §§ 9, 11, 12, 15 (3 Stat. at L., 433); 1823, ch. 21, §§ 13, 14, 21 (3 Stat. at L., 729).

For the construction of the term *imports*, to *United States v. Lyman*, 1 Mason, 482; *United States v. Lindsey*, 1 Gall., 365; *United States v. Vowell*, 5 Cranch, 368.

Upon the third point, to the acts of 1839, ch. 82, § 2 (5 Stat. at L., 348); 1845, ch. 22 (5 Stat. at L., 727); and to *Elliot v. Swartwout*, 10 Pet., 137; *Swartwout v. Gihon*, 3 How., 210, 239–241, 255; *Casy v. Curtis*, Id., 251.

Mr. Justice WOODBURY delivered the opinion of the court.

The plaintiff in error in this case seeks to reverse a judgment below, which enabled the Brunes, as importers of certain sugars into Baltimore, to recover back from the collector a supposed excess of duties, which had been paid upon them. In some of the cargoes there was a small quantity of molasses, but both are regarded as resting on the same basis. The points involved are three in number.

1. What should be the true amount of duties in this case under our revenue system, looking to the general legislation on the subject, and to the nature of the transaction?

2. Whether the result which may be thus obtained should be affected or prevented by the special proviso in the eighth section of the law of 1846?

3. Whether the protests, filed by the importers, were such as to enable them in point of law to recover back all which has been allowed by the court below?

In considering the first question, it is to be noticed that the *632] duties to be paid on imported sugar are now regulated chiefly by the act of Congress of July 30th, 1846. (9 Stat. at L., 46.) By the eleventh section of that act the duties are fixed at thirty per cent. *ad valorem*. The collector here exacted that rate on the quantity of sugar named in the invoice and shipped from foreign ports. But the quantity which arrived and was entered here was less than that shipped, by drainage and waste, to the extent of near five per cent.; and the defendants contended that the duty should be paid only on the diminished quantity.

The general principle applicable to such a case would seem to be, that revenue should be collected only from the quantity or weight which arrives here. That is, what is *imported*,—for nothing is imported till it comes within the limits of a port. (See cases cited in *Harrison v. Vose*, 9 How., 372.) And by express provision in all our revenue laws, duties are imposed only on imports from foreign countries; or the importation from them, or what is imported. (5 Stat. at L., 548, 558.) The very act of 1846 under consideration imposes the duty on what is “imported from foreign countries.” (p. 68.) The Constitution uses like language on this subject. (Article 1, §§ 8, 9.) Indeed, the general definition of customs confirms this view; for, says McCulloch (Vol. I., p. 548), “Customs are duties charged upon commodities on their being imported into or exported from a country.”

As to imports, they therefore can cover nothing which is not actually brought into our limits. That is the whole

amount which is entered at the custom-house; that is all which goes into the consumption of the country; that, and that alone, is what comes in competition with our domestic manufactures; and we are unable to see any principle of public policy which requires the words of the act of Congress to be extended so as to embrace more.

When the duty was specific on this article, being a certain rate per pound, before the act of 1846, it could of course extend to no larger number of pounds than was actually entered. The change in the law has been merely in the rate and form of the duty, and not in the quantity on which it should be assessed.

On looking a little further into the principles of the case, it will be seen that a deduction must be made from the quantity shipped abroad, whenever it does not at all reach the United States, or we shall in truth assess here what does not exist here. The collection of revenue on an article not existing, and never coming into the country, would be an anomaly, a *mere fiction of law, and is not to be countenanced where not expressed in acts of Congress, nor [*633 required to enforce just rights.

It is also the quantity actually received here by which alone the importer is benefited. It is all he can sell again to customers. It is all he can consume. It is all he can reexport for drawback. (1 Stat. at L., 680-689; 4 Stat. at L., 29.)

Nor is his sugar improved in quality by the drainage, so as to raise any equity against him by it. The evidence in the ensuing case from New York, which was argued with this, shows that the article usually becomes of a worse color and quality than before, though if not drained at all it might ferment and become still more inferior.

Indeed, the reasonableness of this deduction seems countenanced by various other acts of Congress. In certain instances, where a loss usually occurs, and where a general and reasonable rate of reduction could be prescribed, they have authorized it expressly in several cases of the character referred to.

Thus, in the case of liquors, a certain fixed per cent. is deducted in the measure, in all cases, for leakage (1 Stat. at L., 166), and still more is deducted for breakage, when in bottles. (1 Stat. at L., 672.) So another reduction is made in weight for tare and draft. (1 Stat. at L., 166.) The last should be *draff*, meaning dust and dirt, and not what is generally meant by "draught" or "draft."

But beside these instances, in cases of an actual injury to

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an article arriving here in a damaged state, a reduction from the value is permitted expressly on account of the diminished value. 1 Stat at L., 41, 166, 665.

The former cases, referred to for illustration, rest on their peculiar principles, and allowances in them are made by positive provisions in acts of Congress, even though the quantity and weight of the real article meant to be imported should arrive here. Because, knowing well that the whole is not likely to arrive, and being able to fix, by a general average, the ordinary loss in those cases with sufficient exactness, the matter has been legislated on expressly.

Yet there are other cases of loss, from various causes, which may be very uncertain in amount, for which no fixed and inflexible rate of allowance can be prescribed, and which must, therefore, in each instance, be left to be regulated by the general provisions for assessing duties, and the general principles applicable to them, as before explained. Consequently, where a portion of the shipment in cases like these does not arrive here, and hence does not come under the possession and *634] *cognizance of the custom-house officers, it cannot, as heretofore shown, be taxed on any ground of law or of truth and propriety, and does not therefore require for its exemption any positive enactment by Congress.

Such is the case of a portion being lost by perils of the sea, or by being thrown overboard to save the ship; or by fire, or piracy, or larceny, or barratry, or a sale and delivery on the voyage, or by natural decay. If there be a material loss, it can make no difference to the sufferer or the government whether it happened by natural or artificial causes. In either case, the article to that extent is not here to be assessed, nor to be of any value to the owner.

To add to such unfortunate losses, the burden of a duty on them, imposed afterwards, would be an uncalled for aggravation, would be adding cruelty to misfortune, and would not be justified by any sound reason or any express provision of law. On the contrary, Congress, in several instances, when the articles imported actually arrived here, and were afterwards destroyed by fire before the packages had been opened and entered into the consumption of the country, have refunded or remitted the duties. 2 Stat. at L., 201; 5 Id., 284; 6 Id., 2.

But much more should duties not be exacted on what was lost or destroyed on its way hither, and which never came even into the possession or control of the custom-house officers, and much less into the use of the community.

Something has been urged in argument on the estimate

made by the appraisers, and the final character attached to it. However that may be, if one was made in this case it could be final only as to the price of the sugar abroad, and not as to the quantity or weight reaching this country. The latter is fixed by another class of officers, authorized by law for that purpose; and if the appraisers undertake to fix it, their action in that respect is *coram non judice*, and a nullity.

The price abroad in this case depended on a variety of circumstances, as the size of the crop, the urgency of the demand in the market, the quality of the article, &c.; and the invoice may be *prima facie* evidence of the result of these and other causes in establishing that price; but for a quarter of a century it has been departed from by the appraisers, if the facts ascertained by them will warrant it; though their action and decision as to the price are understood not to be here in this respect in controversy.

The various circulars from the Treasury Department, which have been referred to, and which have been construed in some *cases to permit the deduction of the quantity not really arriving in this country, and in others to forbid [*635 it, are entitled to much respect in deciding on the true meaning of the revenue laws. But when contradictory or obscure, they furnish less aid, and are never decisive or incontrollable. Their design is, of course, to protect the revenue from evasions, and the policy of the courts is the same, when deciding how the laws ought to be executed on these subjects.

But as Congress wishes to foster an honest and honorable commerce by its laws, no less than obtain revenue, it is neither the true policy nor right of Departments or of courts, nor is it presumed to be their desire, to thwart the views of Congress, or embarrass mercantile business, when not attended by equivocation and fraud, or to throw doubts and difficulties over the liberal course proper to be pursued generally towards the community in any branch of trade.¹

Thinking, then, as we do, that making this deduction is not only the legal, but the more reasonable and liberal course, it has our full approbation.

The second point of inquiry, concerning the restrictive effect of the proviso on the eighth section of the act of 1846, has been very earnestly urged as opposed to a construction allowing this deduction. It is argued, that allowing it would usually reduce the aggregate value below the invoice, and that this is prohibited by the words of the proviso, enacting, "That under no circumstance shall the duty be assessed upon

¹ CITED. *Greely v. Thompson et al.*, 10 How., 234.

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an amount less than the invoice value, any law of Congress to the contrary notwithstanding." 9 Stat. at L., 48.

But this proviso apparently relates to the enactment in the section where it stands, concerning the owner, or his agent, raising the invoice or assessment to "the true market value of such imports in the principal markets of the country whence the importation shall have been made."

If, however, it was meant to be general, as seems more likely from previous laws, and to hold the owner to his invoice in all cases, by a species of estoppel, so far as not to let it be made lower than was originally admitted in the invoice, then the restriction manifestly relates to the price only. He need not be estopped about the quantity in the invoice, as the duty is not assessed on the quantity abroad, but on the quantity reaching home, and entered and ascertained by law by the measurer and weigher here. But he might properly be in respect to the price, as it is on the price abroad, and charges added, that the duty is by law to be assessed.

The language of the proviso is not artistic, nor very clear, *636] *but, from the considerations just stated, we think the words "less than the invoice value" must mean the same as invoice price. It can, too, bear no other construction consistent with its language and probable design, and the evident design, looking to all the circumstances, must govern. 16 Pet., 367; Paine, 11; Bac. Abr., *Stat.*, 1.

But what is calculated to remove all doubt, as to the true meaning of the proviso, is a clause in the act of April 20th, 1818, on this same subject. 3 Stat. at L., 487.

The twelfth section provides, that, in "all cases where the appraised value shall be less than the invoice value, the duty shall be charged on the invoice value in the same manner as if no appraisement had been made."

This is plain and intelligible, and by value refers, of course, to the price in the invoice, as that is to be fixed by the appraisers. Making the deduction, then, which was made below in this case, was no violation of this proviso, as it was a reduction in the quantity below the invoice, and not in the price.

The last question relates to the validity of the protests to the extent held in the Circuit Court.

There is no pretence that the protest by letter, dated the 9th of April, 1847, was not good in form and substance for all the cargoes which had then been entered and the duties not paid. Though in some of the previous entries no protest had been made at the time, under an impression that the duties on what had been lost would voluntarily be refunded,

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yet, where the payment had been closed up, the court did not feel justified, nor do we, in embracing those cases under any existing equities, without the written protest required by the act of Congress (5 Stat. at L., 727). But where the duties had not been closed up in any cases, when the written protest in April was filed,—though the preliminary payment of the estimated duties had taken place,—the court justly considered the protest valid. Because, till the final adjustment, the money remains in the hands of the collector, and is not accounted for with the government, and more may be necessary to be paid by the importer.

The question as to subsequent entries being covered by this protest is not so clearly in favor of the importer. But as they all depended on a like principle,—as from the circulars of the Department some doubt existed whether the excess of duties would not voluntarily be refunded,—as the amounts in each importation were small, and both parties thus became fully aware that the excess in all such cases was intended to be put in controversy and reclaimed,—we are inclined to think this written *protest may fairly be regarded as applying to all subsequent cases of a like [*637 character, belonging to the same parties.

Judgment affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maryland, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs and damages at the rate of six per centum per annum.

THE UNITED STATES, PLAINTIFFS IN ERROR, v. HORACE SOUTHMAYD AND STEPHEN C. SOUTHMAYD.

The decision in the preceding case of *Marriott v. Brune*, affirmed.

The fact, that the seller of sugars abroad takes into consideration the probable loss from drainage, does not justify the collector in our ports in charging a duty upon the portion thus lost. The duty must be assessed upon what arrives in this country, and not upon what was purchased abroad.¹

¹ FOLLOWED. *Balfour v. Sullivan*, 8 Sawy., 650. See *Belcher et al. v. Linn*, 24 How., 625.

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THIS case was brought up, by writ of error, from the Circuit Court of the United States for the Southern District of New York.

It involved the same question as the preceding case of *Marriott v. Brune*, viz. whether, in calculating the duties upon an importation of sugar, allowance should be made for leakage and drainage, with the additional fact in evidence, that the purchaser abroad takes into consideration the probable loss in fixing the price to be paid.

There was in this case only a single importation, which was made from Porto Rico, in September, 1849. The weight of the sugar, according to the invoice, was 191,710 pounds Spanish, and its actual weight at the time of entry 180,713 pounds, the difference being 10,997 pounds. The sugar being appraised, the appraisers added a quarter of a cent per pound to the invoice, and upon the invoice price, thus increased, the duty amounted to \$2,441.70. The defendants paid only \$2,350, being the duty less the loss in weight from drainage. For the difference, being \$91.70, the United States brought suit against the importers. This course was pursued *638] in order *that this case might be brought to this court, under the act of 31st May, 1844 (5 Stat. at L., 658.)

In October, 1849, the cause came on for trial in the Circuit Court, when the jury, under the instructions of the court, which are set forth in the following bill of exceptions, found a verdict for the defendants.

Bill of Exceptions.

The counsel for the plaintiffs, to maintain the issue upon their part, gave in evidence the following invoice and entry. (It is not necessary to recite them *in extenso*.)

The counsel for the defendants then and there admitted, that the defendants were partners, and imported and entered at the custom-house in the city of New York the merchandise contained in the said invoice and entry; that the invoice weight of the sugar, so imported and entered as aforesaid, was 191,710 pounds Spanish, and that its actual weight at the time of entry for the payment of duty was 180,713 pounds Spanish, and that the deficiency in the actual weight from the invoice weight was caused by drainage during the voyage of importation, and amounted to 10,997 pounds Spanish, and, at the rate at which the sugars in the invoice were appraised for the purposes of calculating the duty, was the value of \$335 in the currency of the invoice.

The counsel for the defendants also admitted, that the duty

upon the invoice weight of sugar at the valuation of the appraisers amounted to \$2,441.70, and that they had paid only the sum of \$2,350.

The counsel for the plaintiffs then admitted that the plaintiffs' claim in this clause is only for the sum of \$91.70, being the difference between the duty, if assessed according to the invoice weight, and the duty assessed upon the actual weight when entered.

The plaintiffs' counsel then called witnesses, who, being severally duly sworn, testified as follows:—

Isaac Phillips. I am an assistant appraiser in the New York custom-house, and am principally engaged upon West India goods,—sugars and molasses. I have been such appraiser since November 30, 1846. The invoice now shown me is the original invoice of the importation of sugars in question in this case, and there is upon it a return in my handwriting showing that I added one quarter of a cent per pound to the invoice value. The duty was made up upon (1.) the invoice price; (2.) the charges of export duty and labor; (3.) usual commission; and (4.) the addition of a quarter of a cent a pound. This addition amounted to \$479.28 in the currency of the invoice.

*Moses Taylor. I am, and for more than twenty [*639 years past have been, an importing merchant in the city of New York, and am largely concerned in the importation of sugars, mostly from Havana. My own importations for the last two years were from thirty to forty millions of pounds. I imported about 11,000 hogsheads this year, and about 14,000 last year; the rest of my importation was in boxes. The hogsheads in which sugar is imported are well drove, but not tight, like liquor-casks. The export weight of sugar does not generally hold out on arrival here.

The deficiency is about five per cent. on an average on Muscovado sugars; by Muscovado we mean sugar not clayed or refined,—all sugars which come in hogsheads. This deficiency arises from drainage on the voyage. Never have been in the West India Islands. The fact of the loss by drainage is well known to the trade, and generally enters into the calculations of the importing merchant; it enters into his calculations as to the cost of the article here. I always make such calculation.

Thomas Tileston. I am an importing merchant in this city, and am largely concerned in the West India trade, and constantly receiving sugars. Muscovadoes fall short on arrival, from the export weights, from three to seven per cent.; in the extreme to ten per cent., and on an average four and a half or

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five per cent. This deficiency is caused by drainage. What passes off is syrup or molasses, and goes into the ship's hold and is a total loss. The casks are not made tight because it is not necessary. Tight hogsheads, which would prevent the loss of weight by drainage, cost much more than those actually used. A rum-hogshead costs twice as much as the usual sugar-hogshead, and the rougher casks answer as well. If the syrup or molasses were kept in by tight hogsheads, it would settle in the lower part of the hogshead, and it would cost as much to extract it as it is worth. The effect of importing in tighter casks is not to improve the sugars. We all, who are familiar with the trade, understand that the sugars will fall short. We know when we buy that they will fall short in weight on arrival.

Henry A. Coit. I am an importer of this city engaged in commerce with the West Indies. I have resided many years in Cuba, and have seen sugars manufactured and packed. They are packed in white-oak casks, very strong, to resist pressure, but not so tight as to prevent drainage. The sugar is placed in the casks originally for the purpose of drainage. After it is boiled it is first placed in vats for cooling, where it remains three or four hours; it is then put into the hogs-
 *640] heads, *and they are placed in the receiving-house, standing on their chins over a tank. The bottom of the hogshead is perforated with three or four holes, one half or three quarters of an inch in diameter, to allow free drainage, to let the molasses run into the tank. The next process is to put sugar-cane plugs into the holes, which stops the drainage partially but not entirely. The sugar remains thus in the receiving-house three weeks, sometimes longer, for the purpose of drainage; the casks are then filled up with sugar, the heads put on, the hoops driven, the casks turned upon their bilges, and rolled out for exportation; the holes are generally left with the same stoppage of sugar-cane. The drainage continues until arrival, and after arrival, in New York, but not through the holes in the heads of the hogsheads. The per centage of loss is more or less, according to the perfection of the first drainage and the length of the voyage; the average is about five per cent. The fact that imported sugars do not hold out in weight is well known to the trade, and enters into the calculation of the importer.

Being cross-examined by defendants' counsel, the witness testified that the drainage after the hogsheads are rolled out is from the bilge between the staves, and from the lower heads, where the staves join the heads.

Royal Phelps. I am a merchant in New York in the West
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India trade, and deal in Porto Rico sugars. I have been in Porto Rico, and have seen sugars made there. There is no material difference between the mode of making sugar in Porto Rico and that in use in Cuba, as stated by the last witness. In Porto Rico they use red-oak staves for the hogsheds, and do not usually drain the sugar so long, I think, as three weeks. Porto Rico sugars do not usually hold out on arrival to the export weight; drainage on the voyage is the general cause. I have known invoices overrun in weight on arrival, but in such cases I supposed there was some error in making up the invoices. This loss is well known to the trade, and enters into the calculations of the merchant; the average deficiency is five per cent., perhaps more. Porto Rico usually loses more than Cuba sugar. I am of the firm of Maitland, Phelps, & Co.

The plaintiffs' counsel thereupon rested, and the defendants' counsel thereupon called witnesses, who, being sworn, severally testified as follows:—

Thomas Tileston, being further cross-examined by defendant's counsel, testified: We have imported sugar more or less for more than twenty-five years; have bought and have received consignments. Of late years we have imported several thousand hogsheds each year. I have usually found the holes *in the casks filled with sugar-cane, with the hard part of the cane loosely put in and easily drawn out by [*641 a gimlet. The drainage on the voyage is from the bilge; it is not possible for it to drain from the heads, as the casks are stowed on the bilge. I think no party would be authorized to stow the casks on the chines; good and ordinary stowage would be on the bilge. The sugar-cane is a soft substance, and is not put in with much care; it is to keep the sugar from coming out of the holes, and is sufficient for that purpose. It is my impression, from my experience, that the drainage of the sugar produces a grayish color. The grocers like a sugar of a bright color, with a large, clear, transparent grain. The draining detracts from the liveliness of the sugar; it produces a grayish color, which makes it of less value.

Being cross-examined by the plaintiffs' counsel, the witness testified: All Muscovado sugars diminish above five per cent. on the average. The sugars that drain most are more likely to turn gray, and thus be affected as to their value, than those that drain little. It is difficult, perhaps impossible, for any one purchasing sugar in Cuba to tell how it will turn out in New York, either in respect to drainage or color. In deciding upon the quality of sugars, the judgment of merchants

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is frequently baffled. I cannot say how large a proportion of sugar turns out grayish or sick. I can say, as a general thing, that drainage on the voyage does not improve, but, if any thing, deteriorates the sugar. The sugar generally changes, but does not improve on the voyage. The samples imported in air-tight tin cases (whether rightly sampled in Cuba I cannot say) are better than the sugars in bulk. I have never been in the countries of export, nor seen sugar made, or before it was exported; I judge of the deterioration from what I know, as well as what is the general opinion.

John W. Downes. I am a master of a vessel. I have become acquainted with the manufacture of sugar in Porto Rico. I resided there seventeen years, and was connected with the manufacture of sugar. The process in Porto Rico varies but a trifle from that described by the witness, Mr. Coit. The sugar is from fifteen to thirty days purging in the receiving-house in the casks. The planters use rough-made casks, like rice tierces, only stronger, made of red-oak. The sugar, when placed in casks, is a sort of thick syrup. The holes are bored in the bottom head of the casks. When the drainage is completed, the casks are headed up and rolled out. The sellers never stop the holes up otherwise than as while draining with sugar-cane. Sometimes purchasers put *642] in other plugs; I do always, but as a general rule it is not done. The casks are stowed on the bilge, and the drainage is entirely from the bilge, not through the holes.

Being cross-examined by the plaintiffs' counsel, the witness testified: The casks are stowed on the bilge because they make better stowage for the vessel, and in every way.

Being further examined by the counsel for defendants, the witness testified: I have seen sugar at Porto Rico, on the voyage, and here. Sugar is deteriorated on the voyage, but what effect drainage has on it in this respect I cannot say; whether it is the steam, want of air, bilge-water, drainage, or what injures it, but I know the fact that generally it is injured.

The defendants' counsel then introduced in evidence the following return of the weigher at the custom-house in New York, which was read to the court and jury.

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Weighmaster's Return, Import per Brig John Colby, Ponce.

H. SOUTHMAYD & SONS.

| | | | | | |
|----------|----|--------------------|--------|--------|--------|
| Matilda, | 76 | hogsheads of sugar | 90,916 | 10,909 | 80,007 |
| T | 40 | " " | 47,808 | 5,736 | 42,072 |
| J | 24 | " " | 30,820 | 3,698 | 27,122 |
| Quemada, | 21 | " " | 26,340 | 3,160 | 20,575 |
| L M | 10 | " " | 12,428 | 1,491 | 10,937 |

NEW YORK, *September 29, 1849.*

180,713

DARIUS FERRY,
United States Weigher.

| | |
|---------------------------|--------------|
| Invoice weight | 191,710 lbs. |
| Actual weight in New York | 180,713 |

| | |
|------------|-------------|
| Difference | 10,997 lbs. |
|------------|-------------|

The defendants' counsel then offered to prove that the drawback upon reëxportation was always calculated upon the actual weight of the sugar at the time of reëxportation, as shown by the weigher's return. To this proof the plaintiffs' counsel objected, but the court overruled the objection, and admitted the testimony, and to such ruling the plaintiffs' counsel then and there excepted.

The defendants' counsel then proved that, upon reëxportation of sugars, the drawback was calculated upon the actual weight, as shown by the weigher's return at the time of reëxportation.

The defendants' counsel then rested, whereupon the court charged the jury, that the United States were not entitled to collect any more duties on the defendants' sugars than upon the appraised value per pound, calculated upon the quantity actually entered, as shown by the weigher's return, and that they should find a verdict for the defendants.

To this charge of his honor, the judge, and every part thereof, the plaintiffs' counsel then and there excepted.

Upon this exception the case came up to this court.

It was argued by *Mr. Johnson* (Attorney-General), for the plaintiffs in error, and *Mr. Butler*, for the defendants in error.

Mr. Johnson, for the plaintiffs in error, made the following points:—

1st. That the duties were properly assessed upon the amount

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of the invoice, under the eighth section of the Tariff Act of 1846.

2d. That by the sixteenth and seventeenth sections of the Tariff Act of 1842, which are in force, the decision of the appraisers is final, unless appealed from to two merchants, whose decision is final. 5 Stat. at L., 563, 564.

3d. That if it were not, the duties were properly assessed, the loss of the sugars from drainage entering into the estimation of their value at the time of purchase, and their cost to the importer at the time of landing in this country.

4th. That the evidence introduced to show that drawback upon reexportation was always calculated upon the actual weight of the sugar at the time of reexportation was improperly allowed.

Mr. Butler, for the defendants in error, made the following points:—

I. It is conclusively shown, by the facts given in evidence upon the trial, that the difference between the invoice weight at the port of shipment, and the actual weight in New York (10,997 lbs. Spanish), was caused by drainage during the voyage of importation.

II. There being no question of fact to be submitted to the jury, the whole case resolved itself into a question of law, that is, the construction to be given to the proviso in the eighth section of the Tariff Act of July 30, 1846 (Acts and Resolutions 1st Sess. 29th Cong., authorized pamphlet ed., pp. 69, 70), declaring, "that under no circumstances shall the duty be assessed upon an amount less than the invoice value, any law of Congress to the contrary notwithstanding."

In the interpretation of this clause, it is submitted that the following rules should be observed:—

1st. If the words of the proviso be obscure, the intent of its makers is to be resorted to, in order to discover
*644] their meaning. 6 Bac. Abr., tit. *Statute*, I., § 5, pp. 384–386; *Dwarris on Statutes*, 688–690.

2d. This intent is to be collected from the context; from the occasion, spirit, and reason of the law; from other acts *in pari materia* yet in force; and from the general course of legislation on the subject. 1 Bl. Com., 60, 61, 87, 88; 6 Bac. Abr., tit. *Statute*, I., §§ 2, 3, pp. 380, 382; 1 Kent, Com., pp. 461–464; *The Sloop Elizabeth*, 1 Paine, 11; *Bend v. Hoyt*, 13 Pet., 270–273; *Lawrence v. Allen*, 7 How., 793.

3d. While such a construction should be given to the proviso as will remedy the mischief which led to its enactment, the words should not be extended to embrace cases not

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within such mischief. Authorities above cited; *Reniger v. Fogossa*, Plowd., 1, 20; *Zouch v. Stowell*, Plowd., 365, 366; 2 Inst., 386; *Williams v. Pritchard*, 4 T. R., 2.

4th. Nor, if the words of the proviso can be otherwise satisfied, should they be so construed as to produce a consequence repugnant to reason or justice, even though such a consequence be within their literal meaning. Authorities above cited.

5th. Repeals by implication are not favored (6 Bac. Abr., tit. *Statute*, D., p. 373; 2 Dwarris, 673, 674); and therefore a construction which will involve such a repeal of provisions heretofore always treated as an essential part of the revenue laws, and not plainly repugnant to the new statute, should be avoided.

6th. A thing which, by the sound application of the foregoing rules, is found not to be within the intent of Congress, is not within the statute, even though embraced by its letter. The generality of the clause must, in this case, be so restrained in its interpretation as to conform to the intent of its framers. Authorities above cited.

7th. If, after applying all other rules, it be found that the clause equally admits of two constructions, the one imposing, and the other omitting to impose, a burden on the importer, the former of these constructions is to be preferred as the true one. Dwarris on Statutes, 743; *Hubbard v. Johnston*, 3 Taunt., 177, 220, 221; *Adams v. Bancroft*, 3 Sumn., 387; *Bend v. Hoyt*, 13 Pet., 270, 273, 278.

III. The claim of the United States, to collect duties on the invoice weight of the sugars in question, is founded on a construction of the proviso which makes it include the quantity as well as the cost or value of the goods mentioned in the invoice. If this be its true construction, the following results are unavoidable:—

*1st. The operation of the clause cannot be limited to Muscovado sugars, the article now in question, but [*645 must equally apply to all other imported articles, the cost or value of which is stated in the invoice in reference to, and by the computation of, the quantity of such article.

2d. The merchant will be compelled to pay duties on the quantity mentioned in his invoice, how much soever it may exceed the quantity actually imported, and no matter to what cause the difference may be referrible.

3d. As the eleventh section of the act of 1846 (pamphlet ed., p. 70) repeals all acts and parts of acts repugnant to its provisions, the construction claimed by the government, if adopted, must of necessity involve the repeal of all former

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laws making allowances for damage, deficiency, or loss occurring, by whatever cause, during the voyage of importation.

4th. It will also render nugatory many acts still required of the importer, and of the officers of the customs.

IV. The proviso in the eighth section of the Tariff Act of July 30th, 1846, under which the United States claim to collect duties on the invoice weight of the sugars in question, does not, on its fair and true construction, warrant such claim. It relates merely to the cost or value of the goods mentioned in the invoice; it leaves the quantity of such goods to be ascertained according to the preëxisting laws; and in cases where quantity enters into the valuation, it forbids the assessment of the duty upon an amount less than that produced by calculating the true quantity of the goods actually imported, according to the price or value stated in the invoice; but it does not require or authorize the collection of duties on goods which, though described in the invoice, are never brought into the country.

V. The proof given on the trial, that the loss in weight on Muscovado sugars, by drainage during the voyage of importation, is well known to the importing merchants, and enters into their calculations, has no bearing whatever on the construction of the act of Congress, nor can it invalidate the construction given to it by the Circuit Court. Nor is the fact, in any other respect, material or relevant to the decision of this cause.

VI. The fact that the government appraisers, on their examination of the sugar, added to its cost or value one quarter of a cent per pound, amounting, on the invoice weight, to \$479.28 in the currency of the invoice (Macaquino currency, 87½ cents to the dollar, Invoice and Entry, Record, pp. 6, 7), and that this appraisalment was submitted to by the defendants, has no bearing whatever on the questions presented by the record.

*646] *Mr. Justice WOODBURY delivered the opinion of the court.

This case was an importation of both sugar and molasses, under circumstances raising no question, except one, which has not been settled in the preceding case of *Marriott v. Brune et al.*

The additional point here arises on the evidence of several witnesses, that, when sugars of this kind are purchased abroad, the buyer usually takes into consideration in fixing the price, that the drainage or waste in weight will probably equal near five per cent. on the whole. It is argued, that the price

abroad is, therefore, lower in this proportion on this account; and hence, that no deduction should be made here for what is taken into consideration there.

But the first answer to this position is, that if the price is fixed too low there, or lower than it should be on the quantity likely to be saved and to arrive here, it is the duty of the appraisers to raise the price; and it must be presumed they would raise it, if required by all the facts.

In the next place, this calculation by the merchant abroad in fixing the price is a mere speculative or commercial one, connected with profit and loss, and not with a view to the duties to be assessed here.

Again, the duty here is regulated by law, and not by any estimates of such a character by men of business; and by law it is imposed on the quantity entered here, and not the quantity shipped abroad; and on the true price abroad as estimated by the appraisers, and not necessarily as estimated by the owners.

Again, if the owner was benefited by this drainage in the improved quality of the sugars or molasses left, and to the extent of the loss in weight, there might be some equity in considering him liable for the weight abroad. But, as explained in the preceding case, such does not seem to be the current of the evidence.

There are cases, likewise, of imports here, made by the producers of the article abroad. In those, this supposed element in the price to prevent the justice of a reduction in the weight here could hardly exist, as there is no sale abroad; and this shows the incongruity and want of applicability of such a fact to constitute a rule, in any case, for estimating *ad valorem* duties.

There is another objection in the argument of this case, that some matters of fact were not submitted to the jury. But as no request was made on that point below, and the questions seem, by acquiescence on both sides, to have been ruled on the law only, so as to be reconsidered here, it is too late, we think, for objections like those.

Judgment affirmed.

*ORDER.

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This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of New York, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed.

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THE STATE OF PENNSYLVANIA, COMPLAINANT, v. THE
WHEELING AND BELMONT BRIDGE COMPANY, WILLIAM
OTTERSAN, AND GEORGE CROFT.

In a cause depending in this court in the exercise of original jurisdiction, wherein the State of Pennsylvania complained of the erection of a bridge across the Ohio River at Wheeling, the cause was referred to a commissioner, for the purpose of taking further proof, with instructions to report to the court by the first day of the next stated term.¹

THIS case was transferred to this court by an order of Mr. Justice Grier, one of the judges of the Supreme Court of the United States, under the following circumstances.

On the 16th of August, 1849, at the court-room of the Circuit Court of the United States, in the city of Philadelphia, before Mr. Justice Grier, one of the judges of the Supreme Court of the United States, Mr. Stanton appeared to move for an injunction in behalf of the State of Pennsylvania, at the instance of her Attorney-General, against the Wheeling and Belmont Bridge Company, and their agents, William Ottersan and George Croft.

Notice of the motion was given on the 28th of July. At the same time, a copy of the bill was served upon the defendants. The bill stated, among other things,—

“That the Ohio River, being one of the navigable waters leading into the Mississippi, is, and for a long time hath been, an ancient navigable public river, and common highway, free to be navigated by the citizens of the State of Pennsylvania, as well as by all other citizens of the United States. That heading at Pittsburg, in the State of Pennsylvania, and running through that State for the distance of fifty miles, navigable for its whole extent from Pittsburg to its mouth, many citizens of that State long have been, and of right were, and still are, accustomed to navigate said river, to pass and repass *648] along its course and channel unobstructed and at pleasure, with their steamboats, transporting passengers in great numbers, carrying large quantities of freight, and conducting a valuable trade and commerce between the city of Pittsburg, in the State of Pennsylvania, and the ports of Cincinnati, Louisville, St. Louis, New Orleans, and many other places on the Ohio and Mississippi Rivers, and their branches.

“That the defendants are erecting a bridge one hundred

¹ See further decision, 13 How., 518.

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miles below Pittsburg, across the channel of the Ohio River, between Zane's Island and the main Virginia shore or bank at Wheeling. That this bridge will hinder and prevent the passage of citizens of the State of Pennsylvania along said river under said bridge, with their steamboats, as they are commonly accustomed to do, and will obstruct the navigation of the Ohio River. That it will interrupt, hinder, and disturb the citizens of the State of Pennsylvania in their lawful use and enjoyment of the Ohio River as a common highway, in passing and repassing the same, will increase the difficulty, hazard, and expense of navigating it with their steamboats carrying passengers and freight as they have been accustomed, and are now doing, and have right to do; and will interrupt, diminish, and greatly disturb the trade, commerce, and business of the citizens of Pennsylvania over and upon said river, and between the city of Pittsburg and other ports on the Ohio and Mississippi Rivers and their branches; to the great damage and common nuisance of the citizens of Pennsylvania, as well as of other citizens of the United States, and to their irreparable injury."

It also stated that the bridge was erected under color of an act of the Virginia General Assembly, which provides, "If the said bridge, mentioned in the eighth section of this act, shall be so erected as to obstruct the navigation of the Ohio River in the usual manner, by such steamboats and other crafts as are now commonly accustomed to navigate the same, when the river shall be as high as the highest floods heretofore known, then, unless, upon such obstruction being found to exist, such obstruction shall be immediately removed or remedied, the said last-mentioned bridge may be treated as a public nuisance, and abated accordingly." That steamboats were accustomed to navigate the river requiring a space of eighty feet above the water surface, and that the flood of 1832 was $44\frac{1}{2}$ feet above low-water level, usual spring floods being 35 feet, and that the bridge was to be only $93\frac{1}{2}$ feet above low-water level at its eastern end, and 62 feet at the west end.

It was also stated, by way of amendment, that the State of Pennsylvania owned and possessed certain valuable public *improvements of canals and railways for the transportation of passengers and goods, constructed at a [*649 great expense, for channels of commerce, to connect the waters of the Delaware River with the Ohio at Pittsburg, and the waters of Lake Erie with the Ohio at Beaver. That from the transportation of passengers and goods along these works, she was accustomed to receive large tolls and revenue.

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That these works terminated at, and are constructed with direct reference to the free navigation of, the Ohio River. That the goods and passengers transported to and from those ports upon her improvements were accustomed to arrive and depart in steamboats along the Ohio River; and that the Wheeling Bridge would so obstruct the navigation of the river as to cut off the trade and business along the public works of Pennsylvania, impair and diminish her tolls and revenue, and render her improvements useless.

The bill prayed injunction and general relief.

With the bill were filed exhibits, viz. :—

1. The Act of Incorporation by the General Assembly of Virginia, under which defendants claim right to erect the bridge.

The charter contains this clause :—

“ If the said bridge, mentioned in the eighth section of this act, shall be so erected as to obstruct the navigation of the Ohio River in the usual manner, by such steamboats and other crafts as are now commonly accustomed to navigate the same, when the river shall be as high as the highest floods heretofore known, then, unless, upon such obstruction being found to exist, such obstruction shall be immediately removed or remedied, the said last-mentioned bridge may be treated as a public nuisance, and abated accordingly.”

2. A Report of the Engineer of the Bridge Company, accompanied by a diagram.

In this report, the bridge is represented to be 92 feet, at the water's edge, above the low-water line on the Wheeling side, and on the island side 62 feet, deflecting from the water's edge at Wheeling to the island at the rate of 4 feet in 100.

The report also states, that the flood of 1832 was 44½ feet above the low-water level.

A supplemental bill was also exhibited by complainant's counsel, setting forth that, since the preparation of the original bill and service of notice, the defendants had proceeded with their work, and had stretched iron cables across the channel of the river so as to obstruct navigation. It prayed that these might be abated, and for relief, as in the original bill.

The complainant's counsel then read affidavits to show, among other things :—

*650] *1. The amount of steamboat trade and commerce of the Ohio, between Pittsburg and the ports of Cincinnati, Louisville, St. Louis, New Orleans, and other places on the Ohio and Mississippi Rivers.

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2. That a large portion of the steamboats engaged in this trade are owned and navigated, in whole or in part, by citizens of Pennsylvania.

3. That the principal steamboats engaged in this trade required for free passage from sixty to eighty feet space above the water surface, and, as now constructed, cannot, on high water, pass the bridge at Wheeling.

4. That the present diameter and height of their chimneys have been found by experience to be essential to their speed and capacity, and cannot be reduced without impairing the fitness of the boats for profitable and useful trade and commerce.

5. That their chimneys cannot be lowered so as to pass the bridge at Wheeling on high water, without changing their construction, at a great expense; and the process of lowering and hoisting will always be attended with expense, delay, and imminent hazard to the safety of the boat, its crew and passengers,—chimneys being six feet in diameter, and over forty feet above the hurricane deck.

6. That the Pittsburg packets, and other boats of the largest class, have been accustomed to navigate the river to and from Pittsburg, at their present height, and no boats lower their chimneys except when compelled by the state of water in the river to pass through the canal around the falls at Louisville.

7. That the boats accustomed to lower at Louisville are built with reference to passing through the canal, and are much smaller in size and capacity than the Pittsburg packets, and other boats accustomed to navigate the rivers in high waters.

8. That, in the opinion of many practical men, it is impossible to reduce or lower the chimneys of such boats as are engaged in the packet trade. And that the bridge at Wheeling will so obstruct their navigation at high water, for which they are specially adapted, as in a great measure to exclude them from business and diminish their value, there being seven packets, costing each from thirty to forty thousand dollars.

9. That the bridge at Wheeling will so obstruct navigation that a large portion of trade hitherto accustomed to pass and re-pass to and from Pittsburg will be excluded from that port and other ports of Ohio and Pennsylvania above Wheeling.

10. That, in the opinion of competent engineers, a bridge might be so erected as not to obstruct navigation.

The defendants then filed to the original bill their answer, in which it was set forth,—

*651] *That by the statutes of Virginia, referred to in the bill, the defendants are the delegates and trustees of certain franchises, part of the eminent domain of that State, exercisable within her territory.

That the sovereignty of Virginia over the place in which this erection is to be made has never been ceded or surrendered. That the clause of the ordinance of 1787 which declared that "the navigable waters leading into the Mississippi and St. Lawrence, &c., shall be common highways, and for ever free to the citizens of the United States," &c., was not intended to operate within the reserved territory and sovereignty of Virginia.

That a free navigation is not to be understood as one free from such partial or incidental obstacles as the best interests of society may render necessary, and does not prevent States from constructing in or over such rivers such beneficial bridges or useful improvements of navigation as may not materially obstruct them as highways.

That Congress, in 1806, ordered a road to be constructed from Cumberland to the Ohio, and afterwards provided for its continuation from the western bank of Ohio to the Muskingum River and Zanesville, and so on through the States of Ohio, Indiana, and Illinois. That this road was afterwards surrendered to the States through which it passed.

That the passage by ferry between Wheeling and Zane's Island was found dilatory and precarious by day, and ordinarily useless by night, being frequently impassable on account of ice, &c.

That, a bridge being much desired by the people of Ohio and Virginia, acts were passed in 1816 by those States, authorizing a bridge across the river at Wheeling, but which provided that, if such a bridge should be so constructed as to injure the navigation of the said river, it should be treated as a public nuisance, and be liable to abatement as other public nuisances. And ten years were allowed for completion of the bridge.

That, by an act of Virginia of 1836, certain facilities for the reorganization of the said company were conferred, and the time, by consent of Ohio, extended ten years longer; that this company constructed a bridge from Zane's Island to the Ohio, or western shore.

That on the 14th of March, 1847, the Legislature of Virginia passed an act reviving and continuing certain parts of the former acts, and providing for the reorganization of the corporation "with power to erect and keep a wire suspension

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toll-bridge on and from Zane's Island to and upon the main Virginia shore or bank at the city of Wheeling."

*That this act had the following proviso:—"That if the said bridge shall be so erected as to obstruct the navigation of the Ohio River in the usual manner, by such steamboats and other crafts as are now accustomed to navigate the same, when the river shall be as high as the highest flood therein heretofore known, then, unless, upon such obstruction being found to exist, such obstruction shall be immediately removed or remedied, the said last-mentioned bridge may be treated as a public nuisance, and abated accordingly."

That respondents were organized under this act in May, 1847, and an engineer appointed in July, 1847, who reported a plan, which was published and extensively circulated, and made contracts for its erection in September, 1847.

That the elevation of the bridge at the highest point over the channel is over 93½ feet above low-water surface.

That for eighteen months past it has been "steadily and notoriously progressed with"; that the persons at whose suggestion these proceedings are instituted must have known it, and yet, while all this expensive work was being done, no objections were made, but the work quietly permitted to progress until nearly the whole cost of the bridge was expended, the first wires drawn over, and the bridge on the eve of completion.

The answer insists on the following grounds of objection to the proceedings:—

1st. That if the evils imputed to this bridge were true, the persons injured might have remedy in the courts of Virginia, and her Attorney-General is ready to institute proceedings by *quo warranto* or indictment.

2d. That the complainant has no corporate capacity to become a party to a suit in the Supreme Court, to protect or vindicate the rights of her citizens, and prays that this part of their answer may stand for a demurrer or plea, as well as answer.

3d. The defendants admit that the citizens of Pennsylvania, in common with the citizens of the whole United States, are entitled to the use of the Ohio as a common or public highway, but claim that their bridge is not an obstruction, and is itself a connecting line of a great public highway, as important, as a means of intercommunication, as the navigation of the Ohio, and "claim the principle of concession and compromise, which enters so largely into the structure of our

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government." That this bridge will be very beneficial to the people of the neighbouring States.

4th. That the State of Pennsylvania herself has set the example of authorizing bridges to be constructed across this stream no higher than this.

*653] *5th. That the report of certain engineers of the United States to Congress, in 1848, recommended a wire bridge, and gave as their opinion, that "by an elevation of ninety feet every imaginable danger of obstruction or endangering the navigation would be avoided." Also, that certain reports of committees in Congress recognized the necessity of a bridge at Wheeling, and recommended an appropriation, stating that a bridge can be erected that will not offer the slightest obstruction to the navigation.

6th. That the objections to the bridge are only to the insufficiency of headway for steamboats, and they aver that the headway left is amply sufficient; that the highest usual rise of the river Ohio does not exceed thirty-eight and a half feet, but will not average thirty-five feet for spring floods, nor much exceed twenty-nine feet; that the flood of 1832 was an extraordinary flood, which rose forty-four and a half feet above low water at Wheeling, on the 11th of February, 1832; that landings and warehouses were under water, and the river too high for navigation, or, if navigated, that boats might have passed over Zane's Island.

7th. That for all useful purposes the pipes of steamboats need not exceed forty-seven feet above the water, and if the draft should not be sufficient at that height, that blowers might be added. That chimneys might have hinges on them, so that they could be lowered without much inconvenience. That the bridge over the canal at Louisville does not give a headway of over fifty-six feet, and chimneys of greater height usually have hinges to accommodate themselves to it, and steamboats made with high chimneys and without hinges should conform, "because the height of chimneys of steamboats above a certain limit involves secondary considerations of contingent and relative expediency or convenience, rather than such as are of absolute importance or necessity in connection with the material or indispensable purposes of navigation."

8th. That the bridge will not be an appreciable inconvenience to boats of the average class, whose height, they aver, will not average over fifty-two feet, and not sixty-five feet, as stated in the bill; but it is admitted that there are boats whose chimneys are of greater height, which is asserted to be unnecessary; or, if necessary, they should be provided with

hinges; that these high chimneys have been but lately brought into use, are of "extravagant and unnecessary" height, and "got up" by commercial rivals, who promote these proceedings "in the name of a sovereign State, to destroy a useful and necessary work."

*9th and lastly. That the bridge will not diminish or destroy trade between Pittsburg and other ports, or [*654 do irreparable injury to the citizens of Pennsylvania.

Affidavits were also read to support the answer.

After argument by counsel, Mr. Justice Grier delivered an opinion, which concluded as follows:—

"The application of the principles I have stated to the facts of this case will result in refusing, without prejudice, an injunction before the sitting of the Supreme Court for the following reasons:—

"1st. Because the question of the plaintiff's right to prosecute this is new, and involves the jurisdiction of the court. For if the State of Pennsylvania is not entitled to prosecute such an action, the Supreme Court can have no original jurisdiction in the case.

"2d. The injury threatened is not imminent and certain, but contingent. It may or may not happen before the final hearing of this cause, or before this application may be renewed before the court. In the mean while, this cause may be brought to a final hearing, the cause being now at issue, and having preference on the list. And on the first Monday of December next the plaintiff will have an opportunity of moving the court for an injunction on the bill and answer, when the question of jurisdiction can be finally decided. Nor is there any evidence to justify the supposition, that in the mean time the income of the Pennsylvania improvements will be materially affected.

"3d. The injury will not be irremediable if any should occur; as the owner of every boat which may be hindered or delayed in the mean time from passing along the river by this obstruction will have a clear remedy at law, to recover damages against the company and the individuals engaged in its erection.

"4th. If the defendants proceed in the mean time to complete the bridge, they will gain no equity thereby; but if judgment be obtained against them, they will be compelled to abate the nuisance at their own expense.

"It is therefore ordered, that said bill and supplemental bill, answers, and exhibits here read, be filed in the clerk's office of the Supreme Court of the United States, and that the defendants answer the amendment and supplemental bill

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within thirty days, and that on the first day of the next term of the Supreme Court of the United States the complainant have leave to move for an injunction, as prayed for in said original and supplemental bills, and that this order and notice be entered by the clerk on the docket of said court."

*655] *Fursuant to to this order, the bill, supplemental bill, and answers were filed in the office of the clerk of the Supreme Court at Washington, on the 6th of September, 1849.

On the 7th of October, 1849, the Wheeling and Belmont Bridge Company filed their answer to the amended and supplemental bills, reiterating the grounds of defence assumed in the first answer, and suggesting others which had not been previously noticed.

On the 12th of November, 1849, the plaintiff served on the defendant a notice of her intention to apply to the Supreme Court for an injunction, as prayed for in the original and supplemental bills, on other grounds which were set forth in a second supplemental bill, a copy of which accompanied the notice. This second supplemental bill averred that the defendants had erected their bridge over the channel of the Ohio in such a manner as to hinder, and obstruct, and prevent the passage of steamboats, owned and navigated by citizens of Pennsylvania, to and from her ports, over and along said river, and from passing from Pittsburg to other ports in Ohio and Kentucky below said bridge. It charges, that on the 10th day of November, 1849, the steamboat Messenger, owned and navigated by citizens of Pennsylvania, engaged in the carrying trade between Pittsburg, a port of entry in Pennsylvania, and Cincinnati, a port of entry in Ohio, and intermediate ports, duly licensed, equipped, and enrolled according to the acts of Congress, cleared from the said port of Pittsburg with a large cargo of freight and passengers for the port of Cincinnati and other intermediate ports, and while on her voyage along the channel of said river, on the night of the 10th of November, at a usual stage of water, to wit, twenty-one feet, was hindered and obstructed from passing along said channel, and obliged to stop by reason of said bridge, and with great trouble and danger to the officers and crew, and expense and loss of time to her owners, was compelled to have seven and a half feet of her chimneys cut off in order to pass said bridge.

It is further alleged that the Hibernia, another boat owned and navigated by citizens of Pennsylvania, on a voyage from Cincinnati to Pittsburg, on the 11th day of November, 1849, was hindered by said bridge from prosecuting her voyage,

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and obliged to stop at Wheeling, a port of entry in Virginia, and there discharged her passengers and cargo.

The bill further charges, that, since the filing of said original bill, sundry citizens of Pennsylvania have contracted for, and are engaged in, the construction of ships and sea-going vessels, to be propelled by wind and steam, and desire to continue in *said business. That the building of such [*656 vessels is a profitable branch of business, and that any obstruction to the navigation of the Ohio River at high stages of water will interfere with and destroy said branch of business, and prove alike detrimental to the revenues of the Commonwealth of Pennsylvania and to the interests of her citizens. It is further charged, that the Wheeling Bridge will produce this result, and practically give a preference to the port of Wheeling and other ports lower down the river, to the great injury of the citizens and State of Pennsylvania. The plaintiff, therefore, prays that the defendants may be enjoined from keeping said bridge across said river, and be required to abate the same.

On the 2d of February, 1850, the defendants filed their answer to the second supplemental bill.

It stated, "that, since the filing of their former answers in this case, the Legislature of the State of Virginia have passed an act amendatory and explanatory of the various acts which had been previously passed by that body, (and which taken together constituted the charter under which your respondents erected their bridge,) and more particularly of the fourteenth section of the act passed March 19, 1847. This amendatory and explanatory act declares in substance, that, whereas the Wheeling and Belmont Bridge Company, by virtue of an act passed March 19, 1847, entitled 'An act to revive and amend an act, entitled an act incorporating a company to erect a toll-bridge over the Ohio River at Wheeling, passed February 10, 1836,' had erected across and over the main channel of the Ohio River, from the main Virginia shore to Zane's Island, at the city of Wheeling, in Ohio County, a wire suspension-bridge, consisting of a single span of one thousand and ten feet from centre to centre of the supporting towers, the height of which is ninety feet at the eastern abutment, ninety-three and a half feet at the highest point, and sixty-two feet at the western abutment, above the low-water level; and whereas the fourteenth section of the said act of March 19, 1847, provided, among other things, that the said wire suspension-bridge should be so erected as not 'to obstruct the navigation of the Ohio River in the usual manner, by such steamboats and other

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crafts as were then commonly accustomed to navigate the same, when the river should be as high as the highest floods therein heretofore known'; and whereas doubts had arisen as to the true construction or meaning of the said fourteenth section, and it was desirable to remove such doubts, and more clearly to express and declare the true intention and meaning of the aforesaid section, it was by said act declared *657] and enacted, that the said wire *suspension-bridge, so erected across the Ohio River, at Wheeling, as aforesaid, at the height of ninety feet at the eastern abutment, ninety-three and a half feet at the highest point, and sixty-two feet at the western abutment, above the low-water level of the Ohio River, be, and the same thereby was, declared to be of lawful height, and in conformity with the intent and meaning of the said fourteenth section of the act of March 19, 1847.

"A copy of which said act of the General Assembly of Virginia, passed January 11, 1850, and duly authenticated, is herewith exhibited, and prayed to be taken, received, and read, as a part of this answer.

"Your respondents further say, that said act above exhibited furnishes a full and complete answer to all the objections urged by the complainant to your respondents' bridge, on the ground that it has not been constructed in conformity with the requisitions of the character of the company

"Your respondents, therefore, rely on said act of Assembly of Virginia for that and for all other purposes for which it may legally avail, and pray that they may be allowed the benefit of all defences arising under said act, in the same manner, and to the same extent, as if specially pleaded.

"Having fully answered, your respondents pray to be hence dismissed, with their costs by them in this behalf unjustly expended."

Numerous depositions were filed on behalf of the complainant and respondents, which it is not expedient further to refer to, as the order of the court is merely interlocutory.

The cause was opened by *Mr. Darragh* and *Mr. Stanton*, for the complainant, and concluded upon the same side by *Mr. Walker*. For the respondents, it was argued by *Mr. Stuart* and *Mr. Johnson* (Attorney-General). A report of the arguments of the counsel is deferred until the final decision of the case.

Mr. Justice NELSON announced that the court had passed the following interlocutory order.

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The court having heard the counsel on the part of the complainant, and also on the part of the respondents, on the motion for an injunction in this cause to remove the obstruction of the navigation of the Ohio River, as charged in the original, amended, and supplemental bills of the complainant, by means of the erection of the suspension bridge in said bills mentioned, and which said obstruction is denied in the answers put in thereto by the respondents; and on due deliberation being had thereon, *and upon the pleadings [*658 and the proofs before us, it is ordered, that the cause be referred to the Honorable R. Hyde Walworth, late Chancellor of the State of New York, as a commissioner of the court, hereby appointed, to take such further proofs in the cause as the counsel for the respective parties may see fit to produce before him, at such time or times, and at such place or places, as he may appoint, on the application of the counsel of either party; due notice being given of the time and place of the taking of the said proofs.

1 Upon the question, whether or not the bridge aforesaid, mentioned in the pleadings aforesaid, is or is not an obstruction of the free navigation of the said Ohio River at the place where it is erected across the same, by vessels propelled by steam or sails, engaged, or which may be engaged, in the commerce of navigation of said river; and if an obstruction, as aforesaid, shall be made to appear, what change or alteration in the construction and existing condition of the said bridge, if any, can be made, consistent with the continuance of the same across said river, that will remove the obstruction to the free navigation by the vessels aforesaid, engaged in the commerce and navigation of said river as aforesaid; and,

2. That the said commissioner shall report to this court by the first day of the next stated term thereof, upon the questions hereby referred to him, together with the proofs which shall have been produced before him by the respective parties. And that all other questions in the said cause shall be reserved until the coming in of the said report of the commissioner, and the further hearing of counsel upon the matters therein; and,

3. That the said commissioner shall have the power, if deemed necessary by him in the course of the hearing of the said cause, to appoint a competent engineer, whose duty it shall be to take the measurement of said bridge, its appendages and appurtenances and localities in connection therewith, under the direction and instructions of said commissioner, and to make a report to him on the same, which report shall be annexed to the report of the said commissioner to this court.

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The said commissioner is hereby authorized to appoint a clerk to assist him in the execution of this commission.

The compensation to be allowed to the said commissioner for his time and services, for his clerk and engineer that may be appointed, and all other necessary expenses by him incurred in said commission, upon the coming in of the report of the commissioner, will be ascertained and fixed and awarded against the parties, as the court may deem right and proper, upon the principles of equity and justice.

*659] *And that the parties shall each advance to the said commissioner two hundred and fifty dollars, before or at the time he enters upon the execution of the commission.

The clerk will send a certified copy of this order to the commissioner.

To this order Mr. Justice DANIEL dissents. It is his opinion, that the case is not presented to this court between such parties in interest as can give jurisdiction to this court. The only legitimate ground of jurisdiction in this case, under the Constitution, would be the fact of such a direct interest or right on the part of Pennsylvania as a State as would authorize her to become a party in this controversy. The interest of the State of Pennsylvania in this case, if indeed any such is shown, is that which she may have in the competition which may or which does exist between works of public improvement erected by herself, and rival works erected by other States within their own territory. No direct interest on the part of the State of Pennsylvania is shown in the vessels or steamboats which navigate the rivers Ohio and Mississippi, nor in any question connected with the rights of that State separate and apart from the individual interests of the owners of steamboats, or other private citizens of the State of Pennsylvania. Again, the question of nuisance or no nuisance is one proper for the cognizance of a court of law, to be determined by a jury upon the testimony of witnesses confronted and cross-examined before a jury in open court, and under its supervision. In this view of the question, it would seem to be irregular to determine it upon affidavits and by a court of equity, and without the interposition of a jury, and in the absence of the witnesses. The order now made in this cause seeming to lead to the latter mode of settling the question of nuisance, it is therefore hereby formally objected to.

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TO THE

MATTERS CONTAINED IN THIS VOLUME.

The references are to the STAR (*) pages.

ALABAMA.

1. By the admission of the State of Alabama into the Union, that State became invested with the sovereignty and dominion over the shores of navigable rivers between high and low water mark. Consequently, after such admission, Congress could make no grant of land thus situated. *Goodtitle v. Kibbe*, 471.

APPEAL AND ERROR.

1. Where the defendant pleaded his discharge under the Bankrupt Act of 1841 passed by Congress, and the plea was allowed, the plaintiff cannot bring the case to this court to be reviewed, under the twenty-fifth section of the Judiciary Act. *Strader v. Baldwin*, 261.
2. The defendant pleaded a privilege or exemption under a statute of the United States, and the decision was in favor of it. *Ib.*
3. The case, must, therefore, be dismissed, for want of jurisdiction. *Ib.*
4. No exception can be taken in this court which was not moved below, or which does not appear in some way on the record below. *Barrow v. Reab*, 366.
5. Where land was sold under an execution, and the money arising therefrom about to be distributed amongst creditors by an order of the Circuit Court, a controversy between the creditors as to the priority of their respective judgments cannot be brought to this court, either by appeal or writ of error. *Bayard v. Lombard*, 530.
6. Although the State in which the judgment was given allowed appeals, by statute, in similar cases arising in the courts of the State, yet it does not follow from the adoption of the forms of process in execution that the courts of the United States adopted the modes of reviewing the decisions of inferior courts. *Ib.*
7. An appeal to this court is given in chancery cases alone. *Ib.*
8. Nor is the case a proper one for a writ of error. Such a writ cannot be sued out by persons who are not parties to the record, in a matter arising after execution, by strangers to the judgment and proceedings, and where the error assigned is in an order of the court disposing of certain funds in their possession accidentally connected with the record. *Ib.*
9. The creditors should have filed their bill in equity, or stated an issue in due legal form, with proper parties, setting forth the merits of their respective claims, in order to lay the foundation for an appeal or writ of error to this court. *Ib.*
10. The Judiciary Act of 1789 made no provision for the revision, by this court, of judgments of the Circuit or District Courts in criminal cases; and the act of 1802 (2 Stat. at L., 156) only embraced cases in which the opinions of the judges were opposed in criminal cases. There is, therefore, no general law giving appellate jurisdiction to this court in such cases. *Forsyth v. United States*, 571.
11. But the act of Congress passed on the 22d of February, 1847 (Sess. Laws, 1847, ch. 17) providing that certain cases might be brought up from

APPEAL AND ERROR—(Continued.)

- the Territorial courts of Florida to this court, included all cases, whether of civil or criminal jurisdiction. *Ib.*
12. Under this act, this court can revise a judgment of the Superior Court of the District of West Florida in a criminal case, which originated in October, 1845, and was transferred to the District Court of the United States for the Northern District of Florida. *Ib.*
 13. Proceeding, therefore, to revise the judgment, this court decides that the jurisdiction of the Territorial courts, of which the Superior Court was one, ceased on the erection of the Territory into a State, on the 3d of March, 1845. The proceedings before the court in which the indictment was found were, consequently, *coram non judice*, and void. *Ib.*
 14. In the case of *Forsyth v. The United States*, this court decided that the act of Congress passed on the 22d of February, 1847 (Sess. Laws, 1847, ch. 17), gave jurisdiction to this court to review certain classes of cases brought up from the Territorial courts of Florida. *Cotton v. United States*, 579.
 15. A motion to dismiss one of these cases, for want of jurisdiction, must be denied. *Ib.*
 16. Where no citation had been issued or served upon the defendant in error, the cause must be dismissed on motion. *Hogan v. Ross*, 602.

ASSIGNMENT.

1. The laws of Alabama place sealed instruments, commonly called single bills, upon the footing of promissory notes, by allowing the defendant to impeach or go into their consideration; and also permit their assignment, so that the assignee can sue in his own name. But in such suit, the defendant shall be allowed the benefit of all payments, discounts, and set-offs, made, had, or possessed against the same, previous to notice of the assignment. *Withers v. Greene*, 213.
2. The construction of this latter clause is, that where an assignee sues, the defendant is not limited to showing payments or set-offs made before notice of the assignment, but may also prove a total or partial failure of the consideration for which the writing was executed. *Ib.*
3. Proof of a partial failure of the consideration may be given in evidence in mitigation of damages. *Ib.*
4. The English and American cases upon this point examined, showing a relaxation of the old rule, and allowing a defendant to obtain justice in this way, instead of driving him to a cross action for damages. *Ib.*
5. Thus, where the obligor of a single bill was sued by an assignee, and pleaded that the bill was given for the purchase of horses which were not as sound nor of as high a pedigree as had been represented by the seller, such a plea was admissible. *Ib.*
6. It is not a sufficient objection to the plea, that it omits a disclaimer of the contract, and a proffer to return the property. If the defendant looked only to a mitigation of damages, he was not bound to do either, and therefore was not bound to make such an averment in his plea. *Ib.*
7. Nor is it a sufficient objection to the plea, that it avers that the obligation was obtained from him by fraudulent representations, or that it concludes with a general prayer for judgment. Pleas in bar are not to receive a narrow and merely technical construction, but are to be construed according to their entire subject-matter. *Ib.*
8. In this respect there is a difference between pleas in bar and pleas in abatement. *Ib.*

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. The laws of Alabama place sealed instruments, commonly called single bills, upon the footing of promissory notes, by allowing the defendant to impeach or go into their consideration; and also permit their assignment, so that the assignee can sue in his own name. But in such suit, the defendant shall be allowed the benefit of all payments, discounts, and set-offs, made, had, or possessed against the same, previous to notice of the assignment. *Withers v. Greene*, 213.

BILLS OF EXCHANGE AND PROMISSORY NOTES—(Continued.)

2. The construction of this latter clause is, that where an assignee sues, the defendant is not limited to showing payments or set-offs made before notice of the assignment, but may also prove a total or partial failure of the consideration for which the writing was executed. *Ib.*
3. Proof of a partial failure of the consideration may be given in evidence in mitigation of damages. *Ib.*
4. The English and American cases upon this point examined, showing a relaxation of the old rule, and allowing a defendant to obtain justice in this way, instead of driving him to a cross action for damages. *Ib.*
5. Where promissory notes were executed in Louisiana, but made payable in Mississippi, and indorsed in Mississippi, and the indorsee sues in Louisiana, the law of Mississippi, and not that of Louisiana, must be the law of the case. *Brubston v. Gibson*, 263.
6. By the law of Mississippi, where the indorsee sues the maker, the "defendant shall be allowed the benefit of all want of lawful consideration, failure of consideration, payments, discounts, and set-offs, made, had, or possessed against the same, previous to notice of the assignment." *Ib.*
7. Where the notes were originally given for the purchase of a plantation, which plantation was afterwards reclaimed by the vendor (under the laws of Louisiana and the deed), and, in the deed of reconveyance made in consequence of such reclamation, the plantation remained bound for the payment of these notes, these facts do not show a "want of lawful consideration, failure of consideration, payment, discount, nor set-off," and consequently furnish no defence for the maker when sued by the indorsee. *Ib.*
8. The fact, that the notes were indorsed "*Ne varietur*" by the notary, did not destroy the negotiability of the notes. *Ib.*
9. In an action upon a bill of exchange brought by the holder, residing in Alexandria, against the indorser, a physician residing in Maryland, the bill upon its face not being dated at any particular place, it was sufficient proof of due diligence to ascertain the residence of the indorser before sending him notice of the dishonor of the bill, that the holder inquired from those persons who were most likely to know where the residence of the indorser was. *Lambert et al. v. Ghieselin*, 562.
10. Where a notice is sent, after the exercise of due diligence, a right of action immediately accrues to the holder, and subsequent information as to the true residence of the indorser does not render it necessary for the holder to send him another notice. *Ib.*

BOUNDARIES.

1. State courts have a right to decide upon the true running of lines of tracts of land, and this court has no authority to review those decisions under the twenty-fifth section of the Judiciary Act. *Almonester v. Kenton*, 1.
2. Where the decision was that the true lines of the litigants did not conflict with each other, but the losing party alleged that her adversary's title was void under the correct interpretation of an act of Congress, this circumstance did not bring the case within the jurisdiction of this court. *Ib.*
3. Nor is the jurisdiction aided because the State court issued a perpetual injunction upon the losing party. This was a mere incident to the decree, and arose from the mode of practice in Louisiana, where titles are often quieted in that way. *Ib.*

CANALS.

1. The Chesapeake and Delaware Canal Company have no right under their charter to demand toll from passengers who pass through the canal, or from vessels on account of the passengers on board. *Perrine v. Chesapeake and Delaware Canal Co.*, 172.
2. The articles upon which the company is authorized to take toll are particularly enumerated, and the amount specified. The toll is imposed on commodities on board of a vessel passing through the canal. *Ib.*

CANALS—(Continued.)

3. No toll is given on the vessels themselves, except only when they have no commodities on board, or not sufficient to yield a toll of four dollars. Passengers are not mentioned in the enumeration, nor is any toll given upon a vessel on account of the persons or passengers it may have on board. *Ib.*
4. A corporation created by statute is a mere creature of the law, and can exercise no powers except those which the law confers upon it. The canal company is not the absolute owner of the works, but holds the property only for the purposes for which it was created. It has not, therefore, the same unlimited control over it which an individual has over his property. *Ib.*
5. Nor has the company a right to refuse permission for passengers to pass through the canal. On the contrary, any one has a right to navigate the canal for the transportation of passengers with passenger boats, without paying any toll on the passengers on board, upon his paying or offering to pay the toll prescribed by law upon the commodities on board, or the toll prescribed by law on a vessel or boat when it is empty of commodities. *Ib.*

CHANCERY.

See LANDS, PUBLIC.

1. Where a right to a public highway is alleged to be violated, and a remedy is sought through an injunction, it is not issued, either at the instance of a public officer or private individual, unless there is danger of great, continued, and irreparable injury; and not issued at the instance of an individual, claiming under such public right, unless he has suffered some private, direct, and material damage beyond the public at large. *Irwin v. Dixon et al.*, 10.
2. Where the remedy by injunction is sought for an injury to an individual, and not public right, it is necessary also that the right to raise the obstruction should not be in controversy, or have been settled at law. Otherwise, an injunction is not the appropriate remedy. Until the rights of the parties are settled by a trial at law, a temporary injunction only is issued to prevent an irremediable injury. *Ib.*
3. The principles examined which constitute a dedication of land to public uses. *Ib.*
4. This court having sent a mandate to a Circuit Court to put a party into possession of certain lands which were the subject of an ejectment suit, it was right in the Circuit Court not to extend the possession further than the land originally recovered in ejectment, although other lands were afterwards drawn into the controversy. *Walden et al. v. Bodley's Heirs et al.*, 34.
5. Where a defendant in ejectment aliens the property in dispute whilst the proceedings are pending, a possession by the vendee will not justify a plea of the statute of limitations. This court having issued an order, after the expiration of the demise, that the Circuit Court should place the plaintiff in possession, such an order proceeded on principles governing a court of equity, and the Circuit Court was bound to conform to it. *Ib.*
6. The statute of 43d Elizabeth, respecting charitable uses, having been repealed in Virginia, the courts of chancery have no jurisdiction to decree charities where the objects are indefinite and uncertain. *Wheeler v. Smith et al.*, 55.
7. Therefore, where a bequest was made to trustees for such purposes as they considered might promise to be most beneficial to the town and trade of Alexandria, such bequest was void. *Ib.*
8. Where there were joint and several bonds given for duties, and the United States had recovered a joint judgment against all the obligors, and then the surety died, it was not allowable for the United States to proceed in equity against the executor of the deceased surety for the purpose of holding the assets responsible. *United States v. Price*, 83.
9. The rule formerly, with regard to the enforcement of marriage articles

CHANCERY—(Continued.)

- which created executory trusts, was this; namely, that chancery would interfere only in favor of one of the parties to the instrument or the issue, or one claiming through them; and not in favor of remote heirs or strangers, though included within the scope of the provisions of the articles. They were regarded as volunteers. *Neves et al. v. Scott et al.*, 196.
10. But this rule has in modern times been much relaxed, and may now be stated thus: that if, from the circumstances under which the marriage articles were entered into by the parties, or as collected from the face of the instrument itself, it appears to have been intended that the collateral relatives, in a given event, should take the estate, and a proper limitation to that effect is contained in them, a court of equity will enforce the trust for their benefit. *Ib.*
 11. The following articles show an intention by the parties to include the collateral relatives:—
 “Articles of agreement made and entered into this 17th day of February, in the year 1810, between John Neves and Catharine Jewell, widow and relict of the late Thomas Jewell, (deceased,) all of the State and county aforesaid, are as follows, viz.:—
 “Whereas a marriage is shortly to be had and solemnized between the said John Neves and the said Catharine Jewell, widow, as aforesaid, are as follows, to wit:—that all property, both real and personal, which is now, or may hereafter become, the right of the said John and Catharine, shall remain in common between them, the said husband and wife, during their natural lives, and should the said Catharine become the longest liver, the property to continue hers so long as she shall live, and at her death the estate to be divided between the heirs of her, said Catharine, and the heirs of the said John, share and share alike, agreeable to the distribution laws of this State made and provided. And, on the other hand, should the said John become the longest liver, the property to remain in the manner and form as above.” *Ib.*
 12. Moreover, these articles are an executed trust, not contemplating any future act, but intended as a final and complete settlement. *Ib.*
 13. Property acquired by either party after the marriage must follow the same direction which is given by the settlement to property held before the marriage, if there is a clause to that effect in the same. *Ib.*
 14. The laws of Mississippi limit the liability of the sureties in the official bond of a sheriff to the amount of the penalty. *Humphreys v. Leggett et al.*, 297.
 15. Where a surety had been compelled to pay the whole amount of his bond before a third party recovered judgment, the surety ought to have been relieved against an execution by this third party. *Ib.*
 16. Not having been allowed to plead *puis darrein continuance*, and protect himself in this way by showing that he had paid the full amount of his bond, the surety ought to have been relieved in equity where he had filed a bill for relief. *Ib.*
 17. The chancery act of Ohio of 1824 confers on the Court of Common Pleas general chancery powers. The twelfth section gives jurisdiction over the rights of absent defendants, on the publication of notice, “in all cases properly cognizable in courts of equity, where either the title to, or boundaries of, land may come in question, or where a suit in chancery becomes necessary in order to obtain the rescission of a contract for the conveyance of land, or to compel the specific execution of such contract.” *Boswell's Lessee v. Otis et al.*, 336.
 18. A bill being filed to compel the specific execution of a contract relating to land, where the defendants were out of the State, the court passed a money decree, and ordered the sale of other lands than those mentioned in the bill. *Ib.*
 19. This decree was void, and no title passed to the purchaser at the sale ordered by the decree. *Ib.*
 20. The act did not authorize such an act of general jurisdiction. A special jurisdiction only was given *in rem*. *Ib.*

CHANCERY—(*Continued.*)

21. Jurisdiction is acquired in one of two modes,—first, as against the person of the defendant, by the service of process, or secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case, the defendant is not personally bound by the judgment, beyond the property in question. *Ib.*
22. Whilst an ejectment suit was pending to try the legal title to a tract of land in Mississippi, the defendants filed a bill on the equity side of the court, praying for a perpetual injunction, upon the ground that the plaintiffs had obtained a patent from the United States by fraud and misrepresentation. *Gaines et al. v. Nicholson et al.*, 356.
23. But the fraud is not established by the evidence, and therefore the bill must be dismissed, and the parties remitted to the trial at law. *Ib.*
24. Where the United States, as indorsees of a promissory note, recovered judgment against the makers thereof, who thereupon filed a bill upon the equity side of the court, and obtained an injunction to stay proceedings, this injunction was improvidently allowed. *Hill et al. v. United States et al.*, 386.
25. The United States were made directly parties defendants; process was prayed immediately against them, and they were called upon to answer the several allegations in the bill. *Ib.*
26. This course of proceeding falls within the principle that the government is not liable to be sued, except by its own consent, given by law. *Ib.*
27. The bill must therefore be dismissed. *Ib.*
28. A court of equity, having obtained jurisdiction to enforce a specific performance of the contract by compelling the company to issue a policy, can proceed to give such final relief as the circumstances of the case demand. *Taylor v. Merchants' Fire Insurance Company of Baltimore*, 390.
29. A prayer for general relief in this case covers and includes a prayer for specific performance. *Ib.*
30. Certificates were issued by the Treasury Department, under a treaty with Mexico, which were payable to a claimant or his assigns upon presentation at the Department. *Baldwin v. Ely*, 580.
31. These certificates being legally assignable under an act of Congress, an indorsement in blank by the original payee was always considered sufficient evidence of title in the holder to enable him to receive the amount of the certificate when presented to the Treasury Department for payment. *Ib.*
32. The possession of them with a blank indorsement is *prima facie* evidence of ownership. *Ib.*
33. Where a complainant in chancery alleged that they had been purloined from him, and the defendant alleged that he had received them from a third person in the regular course of business, the claim of the complainant, who furnished no proof that they had been purloined, to have them restored to him unconditionally, could not be maintained. *Ib.*
34. The bill was one of discovery, and the defendant, in his answer, alleged that he had received them from the third person as security for money loaned. *Ib.*
35. The complainant was entitled to have them restored to him upon his refunding to the holder the amount of the loan for which they had been deposited as security. It was error, therefore, in the court below to dismiss his bill. *Ib.*
36. But as the complainant did not offer to redeem the certificates, but insisted upon their unconditional restoration, the defendant below is entitled to costs in the Circuit Court. But the plaintiff below, who was the appellant here, is entitled to his costs in this court. *Ib.*

CHARITIES.

1. The statute of the 43d Elizabeth, respecting charitable uses, having been repealed in Virginia, the courts of chancery have no jurisdiction to decree charities where the objects are indefinite and uncertain. *Wheeler v. Smith*, 55.
2. Therefore, where a bequest was made to trustees for such purposes as they

CHARITIES—(Continued.)

considered might promise to be most beneficial to the town and trade of Alexandria such bequest was void. *Ib.*

COMMERCIAL LAW.

1. An act of Congress passed on the 28th of February, 1803 (2 Stat. at L., 203), declares that "it shall be the duty of every master or commander of a ship or vessel belonging to citizens of the United States, on his arrival at a foreign port, to deposit his register, sea-letter, and Mediterranean passport with the consul, commercial agent, or vice commercial agent, if any there be, at such port. In case of refusal or neglect of the said master or commander to deposit the papers aforesaid, he shall forfeit and pay \$500." *Harrison v. Vose*, 372.
2. The arrival here spoken of means an arrival for purposes of business, requiring an entry and clearance and stay at the port so long as to require some of the acts connected with business; and not merely touching at a port for advices, or to ascertain the state of the market, or being driven in by an adverse wind and sailing again as soon as it changes. *Ib.*
3. Therefore, when a vessel arrived at the harbour of Kingston, Jamaica, and came to anchor at about a quarter of a mile from the town, but did not go up to the town, nor come to an entry, nor discharge any part of her cargo, nor take in passengers or cargo at Kingston, nor do any business except to communicate with the consignees, by whom the master was informed that his cargo was sold, deliverable at Savannah la Mar, the master was not liable to the penalty for omitting to deliver his papers to the consul. *Ib.*

CONFLICT OF LAWS.

1. Where promissory notes were executed in Louisiana, but made payable in Mississippi, and indorsed in Mississippi, and the indorsee sues in Louisiana, the law of Mississippi, and not that of Louisiana, must be the law of the case. *Brabston v. Gibson*, 263.
2. By the law of Mississippi, where the indorsee sues the maker, the "defendant shall be allowed the benefit of all want of lawful consideration, failure of consideration, payments, discounts, and set-offs, made, had, or possessed against the same, previous to notice of the assignment." *Ib.*
3. Where the notes were originally given for the purchase of a plantation, which plantation was afterwards reclaimed by the vendor (under the laws of Louisiana and the deed), and, in the deed of reconveyance made in consequence of such reclamation, the plantation remained bound for the payment of these notes, these facts do not show a "want of lawful consideration, failure of consideration, payment, discount, nor set-off," and consequently furnish no defence for the maker when sued by the indorsee. *Ib.*
4. The fact, that the notes were indorsed "*Ne varietur*" by the notary, did not destroy the negotiability of the notes. *Ib.*

CONSTITUTIONAL LAW.

1. On the 3d of March, 1825, Congress passed an act (4 Stat. at Large, 121) providing for the punishment of persons who shall bring into the United States, with intent to pass, any false, forged, or counterfeited coin; and also for the punishment of persons who shall pass, utter, publish, or sell any such false, forged, or counterfeited coin. *United States v. Marigold*, 560.
2. Congress had the constitutional power to pass this law. Under the power to regulate commerce, Congress can exclude, either partially or wholly, any subject falling within the legitimate sphere of commercial regulation; and under the power to coin money and regulate the value thereof, Congress can protect the creature and object of that power. *Ib.*
3. The doctrines asserted by this court in the case of *Fox v. The State of Ohio* (5 Howard, 433) are not inconsistent with that now maintained. *Ib.*
4. A State has power to regulate the remedies by which contracts and judgments are sought to be enforced in its courts of justice, unless its regulations are controlled by the Constitution of the United States, or by

CONSTITUTIONAL LAW—(Continued.)

laws enacted under its authority. *Bank of the State of Alabama v. Dalton*, 522.

5. Therefore, where a State passed a law declaring that all judgments which had been obtained in any other State prior to the passage of the law should be barred unless suit was brought upon the judgment within two years after the passage of the act, this law was within the power of the State, and not inconsistent with the Constitution of the United States or any act of Congress. *Ib.*
6. And this was true, although the person against whom the judgment was given became a citizen of the said State upon the very day on which he was sued. The Legislature made no exception, and courts can make none. *Ib.*

CONTRACTS.

1. The obligations of a contract upon the parties to it, except in well-known cases, are to be expounded by the *lex loci contractus*; but suits brought to enforce contracts, either in the State where they were made or in the courts of other States, are subject to the remedies of the forum in which the suit is, including that of statutes of limitation. *Townsend v. Jemison*, 407.
2. The cases of *Leroy v. Crowninshield*, 2 *Mason*, 351, and *McElmoyle v. Cohen*, 13 *Peters*, 312, examined and commented on. *Ib.*
3. Where there was a correspondence relating to the insurance of a house against fire, the insurance company making known the terms upon which they were willing to insure, the contract was complete when the insured placed a letter in the post-office accepting the terms. *Taylor v. Merchants' Fire Insurance Company of Baltimore*, 390.
4. The house having been burned down whilst the letter of acceptance was in progress by the mail, the company were held responsible. *Ib.*
5. On the acceptance of the terms proposed, transmitted by due course of mail to the company, the minds of both parties have met on the subject, in the mode contemplated at the time of entering upon the negotiation, and the contract becomes complete. *Ib.*

CORPORATION.

1. The Chesapeake and Delaware Canal Company have no right under their charter to demand toll from passengers who pass through the canal, or from vessels on account of the passengers on board. *Perrine v. Chesapeake and Delaware Canal Company*, 172.
2. The articles upon which the company is authorized to take toll are particularly enumerated, and the amount specified. The toll is imposed on commodities on board of a vessel passing through the canal. *Ib.*
3. No toll is given on the vessels themselves, except only when they have no commodities on board, or not sufficient to yield a toll of four dollars. Passengers are not mentioned in the enumeration, nor is any toll given upon a vessel on account of the persons or passengers it may have on board. *Ib.*
4. A corporation created by statute is a mere creature of the law, and can exercise no powers except those which the law confers upon it. The canal company is not the absolute owner of the works, but holds the property only for the purposes for which it was created. It has not, therefore, the same unlimited control over it which an individual has over his property. *Ib.*
5. Nor has the company a right to refuse permission for passengers to pass through the canal. On the contrary, any one has a right to navigate the canal for the transportation of passengers with passenger boats, without paying any toll on the passengers on board, upon his paying or offering to pay the toll prescribed by law upon the commodities on board, or the toll prescribed by law on a vessel or boat when it is empty of commodities. *Ib.*
6. Under the earlier charters of the city of Washington, this court decided (8 *Wheaton*, 687), that, where an individual owned several lots which were put up for sale for taxes, the corporation had no right to sell more

CORPORATION—(Continued.)

than one, provided that one sold for enough to pay the taxes on all.
Mason et al. v. Fearson, 248.

7. In 1824, Congress passed an act, providing, "That it shall be lawful for the said corporation, when there shall be a number of lots assessed to the same person or persons, to sell one or more of such lots for the taxes and expenses due on the whole; and also to provide for the sale of any part of a lot for the taxes and expenses due on said lot, or other lots assessed to the same person, as may appear expedient, according to such rules and regulations as the corporation may prescribe." *Ib.*
8. This is not in conflict with the previous decision of this court. The discretion given to the corporation is not unlimited to sell each lot for its own taxes. On the contrary, the words "it shall be lawful" and "may" sell one lot, impose an obligation to stop selling if that one lot produces enough to pay the taxes on all. *Ib.*
9. What a public corporation or officer is empowered to do for others, and it is beneficial to them to have done, the law holds he ought to do. *Ib.*

COUNTERFEITING.

1. On the 3d of March, 1825, Congress passed an act (4 Stat. at L., 121) providing for the punishment of persons who shall bring into the United States, with intent to pass, any false, forged, or counterfeited coin; and also for the punishment of persons who shall pass, utter, publish, or sell any such false, forged, or counterfeited coin. *United States v. Mari-gold*, 560.
2. Congress had the constitutional power to pass this law. Under the power to regulate commerce, Congress can exclude, either partially or wholly, any subject falling within the legitimate sphere of commercial regulation; and under the power to coin money and regulate the value thereof, Congress can protect the creature and object of that power. *Ib.*
3. The doctrines asserted by this court in the case of *Fox v. The State of Ohio* (5 How., 433) are not inconsistent with that now maintained. *Ib.*

CUSTOMS.

See DUTIES.

CUTTING TIMBER ON THE PUBLIC LANDS.

1. On the 2d of March, 1831, Congress passed an act (4 Stat. at L., 472), entitled "An act to provide for the punishment of offences committed in cutting, destroying, or removing live-oak or other timber or trees, reserved for naval purposes." *United States v. Briggs*, 351.
2. The act itself declares, that every person who shall remove, &c., any live-oak or red-cedar trees, or other timber, from any other lands of the United States, shall be punished by fine and imprisonment. *Ib.*
3. The title of the act would indicate that timber reserved for naval purposes was meant to be protected by this mode, and none other. But the enacting clause is general, and therefore cutting and using of oak and hickory, or any other description of timber trees from the public lands, is indictable, and punishable by fine and imprisonment. *Ib.*

DEVISE.

1. The statute of 43d Elizabeth, respecting charitable uses, having been repealed in Virginia, the courts of chancery have no jurisdiction to decree charities where the objects are indefinite and uncertain. *Wheeler v. Smith et al.*, 55.
2. Therefore, where a bequest was made to trustees for such purposes as they considered might promise to be most beneficial to the town and trade of Alexandria, such bequest was void. *Ib.*

DUTIES.

1. Where there were joint and several bonds given for duties, and the United States had recovered a joint judgment against all the obligors, and then the surety died, it was not allowable for the United States to proceed in equity against the executor of the deceased surety for the purpose of holding the assets responsible. *United States v. Price*, 83.
2. During the war between the United States and Mexico, the port of Tampico, in the Mexican State of Tamaulipas, was conquered, and pos-

DUTIES—(Continued.)

- session of it held by the military authorities of the United States, acting under the orders of the President. *Fleming et al. v. Page*, 603.
3. The President acted as a military commander prosecuting a war waged against a public enemy by the authority of his government, and the conquered country was held in possession in order to distress and harass the enemy. *Ib.*
 4. It did not thereby become a part of the Union. The boundaries of the United States were not extended by the conquest. *Ib.*
 5. Tampico was, therefore, a foreign port, within the meaning of the act of Congress passed on the 30th of July, 1846, and duties were properly levied upon goods imported into the United States from Tampico. *Ib.*
 6. The administrative departments of the government have never recognized a place in a newly acquired country as a domestic port, from which the coasting trade might be carried on, unless it had been previously made so by an act of Congress; and the principle thus adopted has always been sanctioned by the Circuit Courts of the United States, and by this court. *Ib.*
 7. By the eleventh section of the act of Congress passed on the 30th of July, 1846 (Stat. at L., Pamphlet, page 46), the duties upon imported sugar are fixed at thirty per cent. *ad valorem*. *Marriott v. Brune et al.*, 619.
 8. The true construction of this law is, that the duty should be charged only upon that quantity of sugar and molasses which arrives in our ports, and not upon the quantity which appears by the invoice to have been shipped; an allowance being proper for leakage. *Ib.*
 9. The proviso in the eighth section, viz., "that under no circumstance shall the duty be assessed upon an amount less than the invoice value," is not in hostility with the above construction, because the proviso refers only to the price, and not to the quantity. *Ib.*
 10. A protest made after the payment of the duties charged, and after the case had been closed up, will not enable a party to recover back the money from the collector; but if the protest be made in a single case, with a design to include subsequent cases, and the money remains in the hands of the collector without being paid into the treasury, and it was so understood by all parties, such a protest will entitle the importer to recover the money from the collector. *Ib.*
 11. The decision in the preceding case of *Marriott v. Brune* affirmed. *United States v. Southmayd et al.*, 637.
 12. The fact, that the seller of sugars abroad takes into consideration the probable loss from drainage, does not justify the collector in our ports in charging a duty upon the portion thus lost. The duty must be assessed upon what arrives in this country, and not upon what was purchased abroad. *Ib.*

EJECTMENT.

1. This court having sent a mandate to a Circuit Court to put a party into possession of certain lands which were the subject of an ejectment suit, it was right in the Circuit Court not to extend the possession further than the land originally recovered in ejectment, although other lands were afterwards drawn into the controversy. *Walden v. Bodley's Heirs*, 34.
2. Where a defendant in ejectment aliens the property in dispute whilst the proceedings are pending, a possession by the vendee will not justify a plea of the statute of limitations. This court having issued an order, after the expiration of the demise, that the Circuit Court should place the plaintiff in possession, such an order proceeded on principles governing a court of equity, and the Circuit Court was bound to conform to it. *Ib.*

EQUITY.

See CHANCERY.

EVIDENCE.

1. Proof of a partial failure of the consideration may be given in evidence in mitigation of damages. *Withers v. Greene*, 213.

EVIDENCE—(Continued.)

2. The English and American cases upon this point examined, showing a relaxation of the old rule, and allowing a defendant to obtain justice in this way, instead of driving him to a cross action for damages. *Ib.*
3. The rule of evidence, as stated by Tindal, Chief Justice, in the case of *Miller v. Travers* (8 Bing., 244), sanctioned by this court, viz.:—"In all cases where a difficulty arises in applying the words of a will or deed to the subject-matter of the devise or grant, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence may be rebutted or removed by the production of further evidence upon the same subject calculated to explain what was the estate or subject-matter really intended to be granted or devised." *Atkinson's Lessee v. Cummins*, 479.
4. Therefore, where the sheriff sold a tract of land under a *feri facias*, and made a deed of it to the purchaser, and it appeared afterwards that the debtor had two tracts near to, but separated from, each other, and the sheriff's deed described one tract accurately except that it called to bound upon two parcels of land which were actually contiguous to the other tract, and the purchaser took possession of that to which the description was mainly applicable, and retained possession for nearly twenty years, parol evidence was admissible to show that the levy and sale applied to one tract only, and not both. *Ib.*

FLORIDA.

1. Whilst Florida was a Territory, Congress established courts there, in which cases appropriate to Federal and State jurisdictions were tried indiscriminately. *Benner v. Porter*, 235.
2. Florida was admitted into the Union as a State, on the 3d of March, 1845. *Ib.*
3. The constitution of the State provided, that all officers, civil and military, then holding their offices under the authority of the United States, should continue to hold them until superseded under the State constitution. *Ib.*
4. But this article did not continue the existence of courts which had been created, as part of the Territorial government, by Congress. *Ib.*
5. In 1845, the Legislature of the State passed an act for the transfer from the Territorial to the State courts of all cases except those cognizable by the Federal courts; and, in 1847, Congress provided for the transfer of these to the Federal courts. *Ib.*
6. Therefore, where the Territorial court took cognizance, in 1846, of a case of libel, it acted without any jurisdiction. *Ib.*

FRAUDULENT CONVEYANCES.

1. Where the heir at law, who was young, needy, and hurried, executed a release, in consideration of a sum of money, to the executors, who were men of high character, and who assured the heir that the bequest was considered to be good, such release was held to be invalid. *Wheeler v. Smith*, 56.

INJUNCTION.

1. Where a right to a public highway is alleged to be violated, and a remedy is sought through an injunction, it is not issued, either at the instance of a public officer or private individual, unless there is danger of great, continued, and irreparable injury; and not issued at the instance of an individual, claiming under such public right, unless he has suffered some private, direct, and material damage beyond the public at large. *Irwin v. Dixon*, 10.
2. Where the remedy by injunction is sought for an injury to an individual, and not public right, it is necessary also that the right to raise the obstruction should not be in controversy, or have been settled at law. Otherwise, an injunction is not the appropriate remedy. Until the rights of the parties are settled by a trial at law, a temporary injunction only is issued to prevent an irremediable injury. *Ib.*
3. Where the United States, as indorsees of a promissory note, recovered judgment against the makers thereof, who thereupon filed a bill upon

INJUNCTION—(Continued.)

the equity side of the court, and obtained an injunction to stay proceedings, this injunction was improvidently allowed. The United States were made directly parties defendants; process was prayed immediately against them, and they were called upon to answer the several allegations in the bill. This course of proceeding falls within the principle that the government is not liable to be sued, except by its own consent, given by law. The bill must therefore be dismissed. *Hill v. United States*, 386.

INSURANCE.

1. Where there was a correspondence relating to the insurance of a house against fire, the insurance company making known the terms upon which they were willing to insure, the contract was complete when the insured placed a letter in the post-office accepting the terms. *Tayloe v. Merchants' Fire Insurance Company of Baltimore*, 390.
2. The house having been burned down whilst the letter of acceptance was in progress by the mail, the company were held responsible. *Ib.*
3. On the acceptance of the terms proposed, transmitted by due course of mail to the company, the minds of both parties have met on the subject, in the mode contemplated at the time of entering upon the negotiation, and the contract becomes complete. *Ib.*
4. The practice of this company was to date a policy from the time when the acceptance was made known to their agent. *Ib.*
5. The agent of the company having instructed the applicant to "send him his check for the premium, and the business was done," the transmission of the check by mail was a sufficient payment of the premium within the terms of the policy. *Ib.*
6. One of the conditions annexed to the policy was, that preliminary proofs of the loss should be furnished to the company within a reasonable time. The fire occurred on the 22d of December, 1844, and the preliminary proofs were furnished on the 24th of November, 1845. This would have been too late, but that the company must be considered to have waived their being furnished, by refusing to issue a policy, and denying their responsibility altogether. *Ib.*
7. The cases in 2 Pet., 25, and 10 Pet., 507, examined. *Ib.*
8. A court of equity, having obtained jurisdiction to enforce a specific performance of the contract by compelling the company to issue a policy, can proceed to give such final relief as the circumstances of the case demand. *Ib.*
9. A prayer for general relief in this case covers and includes a prayer for specific performance. *Ib.*

INTEREST.

1. Formerly the laws of Louisiana did not allow interest on accounts or unliquidated claims; but now it is due from the time the debtor is put in default for the payment of the principal. *Barrow v. Reab*, 366.

JURISDICTION (OF SUPREME COURT).

See CHANCERY.

1. State courts have a right to decide upon the true running of lines of tracts of land, and this court has no authority to review those decisions under the twenty-fifth section of the Judiciary Act. *Almonester v. Kenton*, 1.
2. Where the decision was that the true lines of the litigants did not conflict with each other, but the losing party alleged that her adversary's title was void under the correct interpretation of an act of Congress, this circumstance did not bring the case within the jurisdiction of this court. *Ib.*
3. Nor is the jurisdiction aided because the State court issued a perpetual injunction upon the losing party. This was a mere incident to the decree, and arose from the mode of practice in Louisiana, where titles are often quieted in that way. *Ib.*
4. Where the defendant pleaded his discharge under the Bankrupt Act of 1841 passed by Congress, and the plea was allowed, the plaintiff cannot

JURISDICTION (OF SUPREME COURT)—(Continued.)

- bring the case to this court to be reviewed, under the twenty-fifth section of the Judiciary Act. *Strader et al. v. Baldwin*, 261.
5. The defendant pleaded a privilege or exemption under a statute of the United States, and the decision was in favor of it. *Ib.*
6. The case must, therefore, be dismissed, for want of jurisdiction. *Ib.*
7. Jurisdiction is acquired in one of two modes,—first, as against the person of the defendant, by the service of process, or secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case, the defendant is not personally bound by the judgment, beyond the property in question. *Boswell's Lessee v. Otis et al.*, 336.
8. The Judiciary Act of 1789 made no provision for the revision, by this court, of judgments of the Circuit or District Courts in criminal cases; and the act of 1802 (2 Stat. at L., 156) only embraced cases in which the opinions of the judges were opposed in criminal cases. There is, therefore, no general law giving appellate jurisdiction to this court in such cases. *Forsyth v. United States*, 571.
9. But the act of Congress passed on the 22d of February, 1847 (Sess. Laws, 1847, chap. 17), providing that certain cases might be brought up from the Territorial courts of Florida to this court, included all cases, whether of civil or criminal jurisdiction. *Ib.*
10. Under this act, this court can revise a judgment of the Superior Court of the District of West Florida in a criminal case, which originated in October, 1845, and was transferred to the District Court of the United States for the Northern District of Florida: *Ib.*
11. Proceeding, therefore, to revise the judgment, this court decides that the jurisdiction of the Territorial courts, of which the Superior Court was one, ceased on the erection of the Territory into a State, on the 3d of March, 1845. The proceedings before the court in which the indictment was found were, consequently, *coram non iudice*, and void. *Ib.*

JURISDICTION (OF INFERIOR COURTS).

1. Whilst Florida was a territory, Congress established courts there, in which cases appropriate to Federal and State jurisdictions were tried indiscriminately. *Benner et al. v. Porter*, 235.
2. Florida was admitted into the Union as a State, on the 3d of March, 1845. *Ib.*
3. The constitution of the State provided, that all officers, civil and military, then holding their offices under the authority of the United States, should continue to hold them until superseded under the State constitution. *Ib.*
4. But this article did not continue the existence of courts which had been created, as part of the Territorial government, by Congress. *Ib.*
5. In 1845, the Legislature of the State passed an act for the transfer from the Territorial to the State Courts of all cases except those cognizable by the Federal courts; and, in 1847, Congress provided for the transfer of these to the Federal courts. *Ib.*
6. Therefore, where the Territorial court took cognizance, in 1846, of a case of libel, it acted without any jurisdiction. *Ib.*
7. The case of *Hunt v. Palao*, 4 Howard, 589, commented on and explained. *Ib.*

LANDS, PUBLIC.

See CHANCERY.

TREATIES.

1. The act of Congress of May 26, 1824 (4 Stat. at Large, 52), for enabling claimants to lands within the limits of the State of Missouri and Territory of Arkansas to institute proceedings to try the validity of their titles, and which was revived by the act of June 17th, 1844 (5 Stat. at Large, 676), did not embrace within its operation complete or perfect titles to land. *United States v. Reynes*, 127.
2. It applied to incomplete titles only, derived either from Spanish, French, or British grants, and of these provided for such only as had been

LANDS, PUBLIC—(*Continued.*)

- legally issued by a competent authority, and were protected by treaty. *Ib.*
3. The act, as revived and reenacted as aforesaid, was not designed to invest the holders of imperfect titles with new or additional rights, but merely to provide a remedy by which legal, just, and *bonâ fide* claims might be established. *Ib.*
 4. The treaty of St. Ildefonso, between Spain and the French Republic, and that of Paris, between France and the United States, should be construed as binding on the parties thereto, from the respective dates of those treaties. *Ib.*
 5. Upon no plausible pretext could it be denied that the treaty of St. Ildefonso was obligatory upon Spain from the period of her acceptance of the provision made for the Duke of Parma, in pursuance of that treaty, viz. on the 21st of March, 1801, or from the date at which she ordered the surrender of the Province of Louisiana to France, viz. on the 15th of October, 1802. *Ib.*
 6. A grant by Morales, the Spanish governor, issued on the 2d of January, 1804, for lands included within the limits of Louisiana, was void; Spain having parted with her title to that Province to France, by the treaty St. Ildefonso, on the 1st of October, 1800; and France having ceded the same Province to the United States by the treaty of Paris of the 30th of September, 1803. *Ib.*
 7. Such a grant could not be protected by that article of the treaty of Paris which stipulated for the protection of the people of Louisiana in the free enjoyment of their liberty and property; the term property, in any correct acceptation, being applicable only to possessions or rights founded in justice and good faith, and based upon authority competent to their creation. *Ib.*
 8. The circumstance, that the Spanish authorities retained possession of portions of Louisiana till the year 1810, did not authorize the issuing of grants for land by those authorities, upon the ground that they constituted a government *de facto*, Spain having long previously ceded away her right of sovereignty, and her possession subsequently thereto having been ever treated by the United States as wrongful, viz. after October, 1800. *Ib.*
 9. The decisions of this court in the cases of Foster and Neilson, and Garcia and Lee, sustaining the construction of the political department of the government upon the question of the limits of Louisiana, reviewed and confirmed. *Ib.*
 10. After the cession by Georgia to the United States, in 1802, of all the territory north of 31° north latitude and west of the Chatahoochee River, Congress passed an act (2 Stat. at Large, 229) confirming certain titles derived from the British or Spanish governments, and appointing commissioners to hear and decide upon such claims, whose decision was declared to be final. *La Roche et al. v. Jones et al.*, 155.
 11. In 1812, another act was passed (2 Stat. at Large, 765) confirming the titles of those who were actual residents on the 27th of October, 1795, and whose claims had been filed with the Register and reported to Congress. *Ib.*
 12. A grant of land on the north side of latitude 31, issued in 1789 by the Governor-General of Louisiana and West Florida, was void, because the United States owned all the country to the north of latitude 31°, under the treaty of 1782. Consequently, no title to land so granted could pass by descent. *Ib.*
 13. But the subsequent legislation of Congress conferred a title emanating from the United States, and vested it in the person to whom the commissioners awarded the land. *Ib.*
 14. This title is conclusive against the government, and a court of law cannot now inquire into previous facts, in a collateral action, with a view of impeaching that title. It is equivalent to a patent. *Ib.*
 15. Where territory is ceded, the national character continues for commercial

LANDS, PUBLIC—(Continued.)

- purposes, until actual delivery; but between the time of signing the treaty and the actual delivery of the territory, the sovereignty of the ceding power ceases, except for strictly municipal purposes, or such an exercise of it as is necessary to preserve and enforce the sanctions of its social condition. *Davis v. The Police Jury of Concordia*, 280.
16. The power to grant land or franchises is one of those attributes of sovereignty which ceases. *Ib.*
 17. The Spanish governor of Louisiana had, therefore, no right to grant a perpetual ferry franchise on the 19th of February, 1801; and, consequently, it is not property which was protected by the treaty between France and the United States. *Ib.*
 18. The preemption act of May 29th, 1830, conferred certain rights upon settlers upon the public lands, upon proof of settlement or improvement being made to the satisfaction of the register and receiver, agreeably to the rules prescribed by the Commissioner of the General Land Office. *Lytle et al. v. State of Arkansas et al.*, 314.
 19. The commissioner directed the proof to be taken before the register and receiver, and afterwards directed them to file the proof where it should establish to their entire satisfaction the rights of the parties. *Ib.*
 20. Where the proof was taken in presence of the register only, but both officers decided in favor of the claim, and the money paid by the claimant was received by the commissioner, this was sufficient. The commissioner had power to make the regulation, and power also to dispense with it. *Ib.*
 21. This proof being filed, there was no necessity of reopening the case when the public surveys were returned. *Ib.*
 22. The circumstance, that the register would not afterwards permit the claimant to enter the section, did not invalidate the claim. *Ib.*
 23. The preemption had no right to go beyond the fractional section upon which his improvements were, in order to make up the one hundred and sixty acres to which settlers generally were entitled. *Ib.*
 24. No selection of lands under a subsequent act of Congress could impair the right of a preemption, thus acquired. *Ib.*
 25. On the 2d of March, 1831, Congress passed an act (4 Statutes at Large, 472), entitled "An act to provide for the punishment of offences committed in cutting, destroying, or removing live-oak or other timber or trees, reserved for naval purposes." *United States v. Briggs*, 351.
 26. The act itself declares, that every person who shall remove, &c., any live-oak or red-cedar trees, or other timber, from any other lands of the United States, shall be punished by fine and imprisonment. *Ib.*
 27. The title of the act would indicate that timber reserved for naval purposes was meant to be protected by this mode, and none other. But the enacting clause is general, and therefore cutting and using of oak and hickory, or any other description of timber trees from the public lands, is indictable, and punishable by fine and imprisonment. *Ib.*
 28. Where there are reservations, in Indian treaties, of specific tracts of land, which are afterwards found to be the sections set apart for school purposes under a general law, the reservees have the better title. They hold under the original Indian title which the United States confirmed in the treaty. *Gaines et al. v. Nicholson et al.*, 358.
 29. But where the reservee claimed under a float, no specific tract of land being designated for him in the treaty, this court abstains from expressing an opinion, that being the legal question pending in the court below. *Ib.*
 30. There were two conflicting claims to land in that part of Louisiana west of the Perdido River; one founded upon a French grant in 1757, with possession continuing down to 1787; the other founded upon a Spanish grant in 1788, with possession continuing down to 1819. *Doe v. Eslava et al.*, 421.
 31. Both these claims were confirmed by Congress. *Ib.*
 32. In an ejectment suit, where the titles were in conflict, the State court

LANDS, PUBLIC—(Continued.)

- instructed the jury, that the confirmations balanced each other, and they must look to other evidences of title in order to settle the rights of the parties. *Ib.*
33. The judgment of the court being, ultimately, in favor of the party who claimed under the Spanish grant, this court will not, under the circumstances of the case, disturb that judgment. *Ib.*
 34. The fifth section of the act of Congress passed on the 8th of May, 1822, giving certain powers to the registers and receivers of the land office, did not confer upon them the power of finally adjudicating titles to land. *Ib.*
 35. Under the two acts of Congress passed on the 8th of May, 1822 (4 Stat. at L., 700 and 708), the register and receiver of the land office were not empowered to settle conflicting titles but only conflicting locations. *Doe v. The City of Mobile et al.*, 451.
 36. In this case they did not describe a boundary line by visible objects, but called to bound upon another line. *Ib.*
 37. The authority given to these officers was to be exercised only in cases of imperfect grants, confirmed by the act of Congress, and not cases of perfect title. In these they had no authority to act. *Ib.*
 38. Hence, where a State court left the question of location to be settled by a jury, this court will not disturb the judgment of the State court founded upon such finding. *Ib.*
 39. The decision of this court in *Pollard v. Hagan*, 3 How., 212, reexamined and affirmed. *Goodtitle v. Kibbe*, 471.
 40. By the admission of the State of Alabama into the Union, that State became invested with the sovereignty and dominion over the shores of navigable rivers between high and low water mark. Consequently, after such admission, Congress could make no grant of land thus situated. *Ib.*

LIMITATION OF ACTIONS.

1. Where the cause of action accrued in the State of Mississippi, and suit was brought upon it in the State of Alabama, a plea of the statute of limitations of Mississippi was not a good plea; but the same was demurrable, and the court sustained the demurrer. *Townsend v. Jemison*, 407.
2. The rule is, that the statute of limitations of the country in which the suit is brought may be pleaded to bar a recovery upon a contract made out of its political jurisdiction, and that the statute of *lex loci contractus* cannot. *Ib.*

LOCAL LAW.

1. The obligations of a contract upon the parties to it, except in well-known cases, are to be expounded by the *lex loci contractus*; but suits brought to enforce contracts, either in the State where they were made or in the courts of other States, are subject to the remedies of the forum in which the suit is, including that of statutes of limitation. *Townsend v. Jemison*, 407.

MARRIAGE SETTLEMENTS.

1. The rule formerly, with regard to the enforcement of marriage articles which created executory trusts, was this; namely, that chancery would interfere only in favor of one of the parties to the instrument or the issue, or one claiming through them; and not in favor of remote heirs or strangers, though included within the scope of the provisions of the article. They were regarded as volunteers. *Neves et al. v. Scott et al.*, 106.
2. But this rule has in modern times been much relaxed, and may now be stated thus: that if, from the circumstances under which the marriage articles were entered into by the parties, or as collected from the face of the instrument itself, it appears to have been intended that the collateral relatives, in a given event, should take the estate, and a proper limitation to that effect is contained in them, a court of equity will enforce the trust for their benefit. *Ib.*

MARRIAGE SETTLEMENTS—(Continued.)

8. The following articles show an intention by the parties to include the collateral relatives:—
 “Articles of agreement made and entered into this 17th day of February, in the year 1810, between John Neves and Catharine Jewell, widow and relict of the late Thomas Jewell (deceased), all of the State and county aforesaid, are as follows, viz.:—
 “Whereas a marriage is shortly to be had and solemnized between the said John Neves and the said Catharine Jewell, widow, as aforesaid, are as follows, to wit:—that all property, both real and personal, which is now, or may hereafter become, the right of the said John and Catharine, shall remain in common between them, the said husband and wife, during their natural lives, and should the said Catharine become the longest liver, the property to continue hers so long as she shall live, and at her death the estate to be divided between the heirs of her, said Catharine, and the heirs of the said John, share and share alike, agreeable to the distribution laws of this State made and provided. And, on the other hand, should the said John become the longest liver, the property to remain in the manner and form as above.” *Ib.*
4. Moreover, these articles are an executed trust, not contemplating any future act, but intended as a final and complete settlement. *Ib.*
5. Property acquired by either party after the marriage must follow the same direction which is given by the settlement to property held before the marriage, if there is a clause to that effect in the same. *Ib.*

PATENTS.

1. The documents showing the title to Woodworth's planing-machine are set forth in *extenso* in 4 How., 647, *et seq.* *Wilson v. Simpson et al.*, 109.
2. The assignment from Woodworth and Strong to Toogood, Halstead, and Tyack (4 How., 655) declared not to have been fraudulently obtained according to the evidence in this case. *Ib.*
3. An assignee of Woodworth's planing-machine, having a right, under the decision in 4 How., to continue the use of the patented machine, has a right to replace new cutters or knives for those which are worn out. *Ib.*
4. The difference explained between repairing and reconstructing a machine. *Ib.*

PLEAS AND PLEADING.

1. Thus, where the obligor of a single bill was sued by an assignee, and pleaded that the bill was given for the purchase of horses which were not as sound nor of as high a pedigree as had been represented by the seller, such a plea was admissible. *Withers v. Greene*, 213.
2. It is not a sufficient objection to the plea, that it omits a disclaimer of the contract, and a proffer to return the property. If the defendant looked only to a mitigation of damages, he was not bound to do either, and therefore was not bound to make such an averment in his plea. *Ib.*
3. Nor is it a sufficient objection to the plea, that it avers that the obligation was obtained from him by fraudulent representations, or that it concludes with a general prayer for judgment. Pleas in bar are not to receive a narrow and merely technical construction, but are to be construed according to their entire subject-matter. *Ib.*
4. In this respect there is a difference between pleas in bar and pleas in abatement. *Ib.*
5. Where the cause of action accrued in the State of Mississippi, and suit was brought upon it in the State of Alabama, a plea of the statute of limitations of Mississippi was not a good plea; but the same was demurrable, and the court sustained the demurrer. *Townsend v. Jemison*, 407.
6. The rule is, that the statute of limitations of the country in which the suit is brought may be pleaded to bar a recovery upon a contract made out of its political jurisdiction, and that the statute of *lex loci contractus* cannot. *Ib.*

POST-OFFICE DEPARTMENT.

1. An act of Congress passed on the 2d of July, 1836 (5 Stat. at L., 83),

POST-OFFICE DEPARTMENT—(*Continued.*)

- directs that, where any money has been paid out of the funds of the Post-Office Department to any person in consequence of fraudulent representations or by mistake, collusion, or misconduct of any officer or clerk of the Department, the Postmaster-General shall institute a suit to recover it back. *United States v. Brown*, 487.
2. Where the person who was the chief clerk and treasurer of the Post-Office Department transferred to the Department a deposit which he had made, in his own name, in a bank which had become broken, and in consequence of such transfer received the full value of the deposit from the Department, it was a case which fell within the statute; and the adjudication of the Postmaster-General, ordering the person to be credited upon the books and to receive the money, cannot be considered a final adjudication, closing the transaction from judicial scrutiny. *Ib.*
 3. The rules and regulations of the Post-Office Department placed the whole subject of finance under the charge of the chief clerk. It was within the range of his official duties, therefore, to superintend all matters relating to finance, and he was not entitled to charge a commission for negotiating loans for the use of the Department. *Ib.*
 4. By the ninth section of the act of Congress passed in 1836 (5 Stat. at L., 81), it was enacted that the Postmaster-General was authorized to give instructions to postmasters for accounting and disbursing the public money. *United States v. Roberts et al.*, 571.
 5. In 1838, the Postmaster-General gave instructions to all postmasters, that, where they paid money to contractors for carrying the mail, duplicate receipts were to be taken in the form prescribed, one of which the postmaster was to keep, and the other was directed to be sent by the next mail to the Auditor for the Post-Office Department. *Ib.*
 6. Where a payment was made to a contractor by the surety of a postmaster in his behalf, and no duplicate receipt forwarded to the Post-Office Department, nor any information thereof given to the Department until after a final settlement of the accounts of the contractor had been made, in which settlement the contractor was not charged with the amount of such payment, it was error in the Circuit Court to instruct the jury that they might allow a credit for it to the surety when sued upon his bond, provided they believed from the testimony that the contractor had not received more money than he was entitled to. *Ib.*
 7. By an act passed on the 3d of March, 1825 (4 Stat. at L., 112), Congress declared that if any postmaster shall neglect to render his account for one month after the time, and in the form and manner, prescribed by law, and by the Postmaster-General's instructions conformable therewith, he shall forfeit double the value of the postages which shall have arisen at the same office in any equal portion of time previous or subsequent thereto; or, in case no account shall have been rendered at the time of the trial of such case, then such sum as the court and jury shall estimate as equivalent thereto. *Ib.*
 8. Where, at the time of the trial of a suit by the United States against a postmaster and his surety, there was no return for an entire quarter and a fraction of the ensuing quarter, the proper mode of computing damages was to go back to a quarter for which there was a return, calculate from it the amount due for the deficient quarter and deficient fraction taken together, and then double the sum arrived at by this calculation. *Ib.*

PRACTICE.

1. This court having sent a mandate to a Circuit Court to put a party into possession of certain lands which were the subject of an ejectment suit, it was right in the Circuit Court not to extend the possession further than the land originally recovered in ejectment, although other lands were afterwards drawn into the controversy. *Walden et al. v. Bodley's Heirs et al.*, 34.
2. Where a defendant in ejectment aliens the property in dispute whilst

PRACTICE—(Continued.)

- the proceedings are pending, a possession by the vendee will not justify a plea of the statute of limitations. This court having issued an order, after the expiration of the demise, that the Circuit Court should place the plaintiff in possession, such an order proceeded on principles governing a court of equity, and the Circuit Court was bound to conform to it. *Ib.*
3. No exception can be taken in this court which was not moved below, or which does not appear in some way on the record below. *Barrow v. Reab*, 306.
 4. Where land was sold under an execution, and the money arising therefrom about to be distributed amongst creditors by an order of the Circuit Court, a controversy between the creditors as to the priority of their respective judgments cannot be brought to this court, either by appeal or writ of error. *Bayard v. Lombard et al.*, 630.
 5. Although the State in which the judgment was given allowed appeals, by statute, in similar cases arising in the courts of the State, yet it does not follow from the adoption of the forms of process in execution that the courts of the United States adopted the modes of reviewing the decisions of inferior courts. *Ib.*
 6. An appeal to this court is given in chancery cases alone. *Ib.*
 7. Nor is the case a proper one for a writ of error. Such a writ cannot be sued out by persons who are not parties to the record, in a matter arising after execution, by strangers to the judgment and proceedings, and where the error assigned is in an order of the court disposing of certain funds in their possession accidentally connected with the record. *Ib.*
 8. The creditors should have filed their bill in equity, or stated an issue in due legal form, with proper parties, setting forth the merits of their respective claims, in order to lay the foundation for an appeal or writ of error to this court. *Ib.*
 9. Where no citation had been issued or served upon the defendant in error, the cause must be dismissed on motion. *Hogan et al. v. Ross*, 602.
 10. In a cause depending in this court in the exercise of original jurisdiction, wherein the State of Pennsylvania complained of the erection of a bridge across the Ohio River at Wheeling, the cause was referred to a commissioner for the purpose of taking further proof, with instructions to report to the court by the first day of the next stated term. *State of Pennsylvania v. Wheeling and Belmont Bridge Company*, 647.

PRINCIPAL AND SURETY.

1. Where there were joint and several bonds given for duties, and the United States had recovered a joint judgment against all the obligors, and then the surety died, it was not allowable for the United States to proceed in equity against the executor of the deceased surety for the purpose of holding the assets responsible. *United States v. Price*, 83.
2. The laws of Mississippi limit the liability of the sureties in the official bond of a sheriff to the amount of the penalty. *Humphreys v. Leggett*, 207.
3. Where the surety had been compelled to pay the whole amount of his bond before a third party recovered judgment, the surety ought to have been relieved against an execution by this third party. *Ib.*
4. Not having been allowed to plead *puis darrein continuance*, and protect himself in this way by showing that he had paid the full amount of his bond, the surety ought to have been relieved in equity where he had filed a bill for relief. *Ib.*

RELEASE.

1. Where the heir at law, who was young, needy, and hurried, executed a release, in consideration of a sum of money, to the executors, who were men of high character, and who assured the heir that the bequest was considered to be good, such release was held to be invalid. *Wheeler v. Smith et al.*, 55.

SHIPPING.

1. An act of Congress passed on the 28th of February, 1803 (2 Stat. at L.,

SHIPPING—(Continued.)

- 208), declares that "it shall be the duty of every master or commander of a ship or vessel belonging to citizens of the United States, on his arrival at a foreign port, to deposit his register, sea-letter, and Mediterranean passport with the consul, commercial agent, or vice commercial agent, if any there be, at such port. In case of refusal or neglect of the said master or commander to deposit the papers as aforesaid, he shall forfeit and pay \$500." The arrival here spoken of means an arrival for purposes of business, requiring an entry and clearance and stay at the port so long as to require some of the acts connected with business; and not merely touching at a port for advices, or to ascertain the state of the market, or being driven in by an adverse wind and sailing again as soon as it changes. *Harrison v. Vose*, 372.
2. Therefore when a vessel arrived at the harbor of Kingston, Jamaica, and came to anchor at about a quarter of a mile from the town, but did not go up to the town, nor come to an entry, nor discharge any part of her cargo, nor take in passengers or cargo at Kingston, nor do any business except to communicate with the consignees, by whom the master was informed that his cargo was sold, deliverable at Savannah la Mar, the master was not liable to the penalty for omitting to deliver his papers to the consul. *Ib.*

SPECIFIC PERFORMANCE.

1. The chancery act of Ohio of 1824 confers on the Court of Common Pleas general chancery powers. The twelfth section gives jurisdiction over the rights of absent defendants, on the publication of notice, "in all cases properly cognizable in courts of equity, where either the title to, or boundaries of, land may come in question, or where a suit in chancery becomes necessary in order to obtain the rescission of a contract for the conveyance of land, or to compel the specific execution of such contract." *Boswell's Lessee v. Otis*, 336.
2. A bill being filed to compel the specific execution of a contract relating to land, where the defendants were out of the State, the court passed a money decree, and ordered the sale of other lands than those mentioned in the bill. *Ib.*
3. This decree was void, and no title passed to the purchaser at the sale ordered by the decree. *Ib.*
4. The act did not authorize such an act of general jurisdiction. A special jurisdiction only was given in rem. *Ib.*

TAXES.

1. Under the earlier charters of the city of Washington, this court decided (8 Wheat., 687), that, where an individual owned several lots which were put up for sale for taxes, the corporation had no right to sell more than one, provided that one sold for enough to pay the taxes on all. *Mason et al. v. Fearson*, 248.
2. In 1824, Congress passed an act, providing, "That it shall be lawful for the said corporation, when there shall be a number of lots assessed to the same person or persons, to sell one or more of such lots for the taxes and expenses due on the whole; and also to provide for the sale of any part of a lot for the taxes and expenses due on said lot, or other lots assessed to the same person, as may appear expedient, according to such rules and regulations as the corporation may prescribe." *Ib.*
3. This is not in conflict with the previous decision of this court. The discretion given to the corporation is not unlimited to sell each lot for its own taxes. On the contrary, the words "it shall be lawful" and "may" sell one lot, impose an obligation to stop selling if that one lot produces enough to pay the taxes on all. *Ib.*
4. What a public corporation or officer is empowered to do for others, and it is beneficial to them to have done, the law holds he ought to do. *Ib.*

TOLL.

1. The Chesapeake and Delaware Canal Company have no right under their charter to demand toll from passengers who pass through the canal, or from vessels on account of the passengers on board. *Perrine v. Chesapeake and Delaware Canal Company*, 172.

TOLL—(Continued.)

2. The articles upon which the company is authorized to take toll are particularly enumerated, and the amount specified. The toll imposed on commodities on board of a vessel passing through the canal. *Ib.*
3. No toll is given on the vessels themselves, except only when they have no commodities on board, or not sufficient to yield a toll of four dollars. Passengers are not mentioned in the enumeration, nor is any toll given upon a vessel on account of the persons or passengers it may have on board. *Ib.*
4. A corporation created by statute is a mere creature of the law, and can exercise no powers except those which the law confers upon it. The canal company is not the absolute owner of the works, but holds the property only for the purposes for which it was created. It has not, therefore, the same unlimited control over it which an individual has over his property. *Ib.*
5. Nor has the company a right to refuse permission for passengers to pass through the canal. On the contrary, any one has a right to navigate the canal for the transportation of passengers with passenger boats, without paying any toll on the passengers on board, upon his paying or offering to pay the toll prescribed by law upon the commodities on board, or the toll prescribed by law on a vessel or boat when it is empty of commodities. *Ib.*

TREATIES.

See LANDS, PUBLIC.

1. The treaty of St. Ildefonso, between Spain and the French Republic, and that of Paris, between France and the United States, should be construed as binding on the parties thereto, from the respective dates of those treaties. *United States v. Reynes*, 127.
2. Upon no plausible pretext could it be denied that the treaty of St. Ildefonso was obligatory upon Spain from the period of her acceptance of the provision made for the Duke of Parma, in pursuance of that treaty, viz. on the 21st of March, 1801, or from the date at which she ordered the surrender of the Province of Louisiana to France, viz. on the 16th of October, 1802. *Ib.*
3. The treaty of St. Ildefonso, by which Spain ceded Louisiana to France, became operative to transfer the sovereignty upon the day of its date, viz. the 1st of October, 1800. *Davis v. The Police Jury of Concordia*, 280.
4. The executive and legislative branches of the government of the United States have always maintained this position, and this court concurs with them in its correctness. *Ib.*
5. The preceding case, p. 127, of *The United States v. Reynes* referred to. *Ib.*
6. By the laws of nations, all treaties, as well those for cessions of territory as for other purposes, are binding upon the contracting parties, unless when otherwise provided in them, from the day they are signed. The ratification of them relates back to the time of signing. *Ib.*
7. Where territory is ceded, the national character continues for commercial purposes, until actual delivery; but between the time of signing the treaty and the actual delivery of the territory, the sovereignty of the ceding power ceases, except for strictly municipal purposes, or such an exercise of it as is necessary to preserve and enforce the sanctions of its social condition. *Ib.*
8. The power to grant land or franchises is one of those attributes of sovereignty which ceases. *Ib.*
9. The Spanish Governor of Louisiana had, therefore, no right to grant a perpetual ferry franchise on the 19th of February, 1801; and, consequently, it is not property which was protected by the treaty between France and the United States. *Ib.*

USES.

1. The principles examined which constitute a dedication of land to public uses. *Irwin v. Dixion et al.*, 10.

WAYS.

1. Where a right to a public highway is alleged to be violated, and a remedy is sought through an injunction, it is not issued, either at the instance of a public officer or private individual, unless there is danger of great, continued, and irreparable injury; and not issued at the instance of an individual, claiming under such public right, unless he has suffered some private, direct, and material damage beyond the public at large. *Irvine v. Dixon et al.*, 10.
2. Where the remedy by injunction is sought for an injury to an individual, and not public right, it is necessary also that the right to raise the obstruction should not be in controversy, or have been settled at law. Otherwise, an injunction is not the appropriate remedy. Until the rights of the parties are settled by a trial at law, a temporary injunction only is issued to prevent an irremediable injury. *Ib.*

WILLS.

See CHARITIES; DEVISE.



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